Supreme Court, U.S.
FILED
061427 APR 24 2006
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

BARRY LEBEAU,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the General Savings Statute, 1 U.S.C.A. § 109, permits a Circuit Court to affirm liability under a federal statute but deny damages based upon a subsequent amendment of the liability statute.

2. Whether a Circuit Court may refuse to apply the General Savings Statute, 1 U.S.C.A. § 109, and prior opinions of the Court where the refusal denies breach of trust damages to a class of Native Americans.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that Barry LeBeau is a Native American person and resident of South Dakota. The class members all are lineal descendants of the original Sisseton-Wahpeton Tribe of the Mississippi.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barry LeBeau respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 474 F.3d 1334. The opinion of the district court (App. 18) is reported at 334 F.Supp.2d 1200. The opinion of the district court in *Casimer LeBeau v. United States* is reported at 215 F.Supp.2d 1046 (D.S.D. 2002) (App. 28). The record and findings of *Casimer LeBeau v. United States* were stipulated by the parties and accepted by the Court to be incorporated into the record of *Barry LeBeau v. United States*, 334 F.Supp.2d 1200 (D.S.D. 2001).

JURISDICTION

The court of appeals' judgment was entered on January 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Act of June 19, 1968 (Judgment Fund), Ch. 2, Pub.L. No. 90-352, 82 Stat. 239.
2. Act of October 25, 1972 (1972 Distribution Act), Pub.L. No. 92-555, 86 Stat. 1168 (codified at 25 U.S.C.A. § 1300d, et seq. (1983)).

3. Act of November 13, 1998 (1998 Distribution Act), Pub.L. No. 105-387, 112 Stat. 3471 (codified at 25 U.S.C.A. § 1300d, 21 et seq.).

4. General Savings Statute, 1 U.S.C.A. § 109.

STATEMENT

The petitioners are a class of Native Americans who are descendants of the original Sisseton-Wahpeton Tribe of Mississippi who were not enrolled as tribal members (hereinafter petitioners will be referred to as "lineal descendants").

Barry LeBeau, a lineal descendant, filed this action pursuant to the "Little" Tucker Act, 28 U.S.C.A. § 1364(a)(2). The action demanded damages for breach of fiduciary duty by the Secretary of Interior. The claim alleged the Secretary of Interior unreasonably delayed distribution of judgment funds as required by the 1972 Distribution Act. 86 Stat. 1168. The District Court certified as a class the lineal descendants on the roll prepared as required by the 1972 Distribution Act. The United States "conceded that the 1972 Distribution Act created a trust responsibility that was breached by the Secretary." *LeBeau v. U.S.*, 474 F.3d 1334, 1341 (D.C. 2007).

The history of this action begins prior to 1967. The United States settled a lawsuit for the breach of the United States treaty obligations under the Treaty of Prairie Du Chien, 1830 and the Treaty of Traverse Des Sioux (1851). The Indian Claims Commission approved the settlement in 1967 and entered a judgment of $5,874,039.50. *Sisseton and Wahpeton Bands v. United States*, 18 Ind. Cl. Comm. 477 (1967).

Congress appropriated money in 1968 to pay the judgment and deposited the money into an interest bearing account, the Judgment Fund, in the United States Treasury. 82 Stat. 239.

The Judgment Fund was to be shared by the Devils Lake Sioux Tribe of North Dakota, the Sisseton-Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribe of the Fort Peck Reservation in Montana ("the Tribes") and the lineal descendants. The lineal descendants were members of the original Sisseton-Wahpeton Tribe of Mississippi but were not enrolled in any of the Tribes. *LeBeau v. United States*, 474 F.3d at 1337.

Congress enacted the 1972 Distribution Act establishing a formula for the distribution of the Judgment Fund. The lineal descendants of the Sisseton-Wahpeton Sioux Tribe were beneficiaries of the Judgment Fund established by the 1972 Distribution Act and were allotted 25.0225% of the Judgment Fund.

The Tribes' share of the Judgment Fund was promptly paid.

The Secretary of the Interior under the 1972 Distribution Act was directed to prepare membership rolls and was required to distribute funds on a per capita basis to individuals who were found to be lineal descendants.

"[T]he Secretary issued regulations that established an application procedure for enrollment as a lineal descendant and set a deadline of November 1, 1973 for enrollment applications. 38 Fed. Reg. 13, 737 (May 25, 1973) (Codified at 25 C.F.R. § 41.1 (1973) and recodified at § 61.4 (1995)." *LeBeau v. United States*, 474 F.3d at 1337.

"By 1979, the BIA had processed plaintiffs' applications and officially notified them they were eligible to share in the Judgment Fund. The record demonstrates that at least by March 1982, the Aberdeen Area Office had processed all timely filed applications and made initial determinations of eligibility on those applications." *LeBeau v. United States*, 215 F.Supp.2d at 1060.

"On March 8, 1982, the Aberdeen Area Office sent a request to the Deputy Assistant Secretary – Indian Affairs for permission to make a partial payment of approximately $1,700 to approximately 1,900 lineal descendants that had been determined to be eligible as of 1982." *LeBeau v. United States*, 215 F.Supp.2d 1046, 1051 (D.S.D. 2002).[1]

Again on October 8, 1982, the Aberdeen Area Office made a request to the Secretary of Interior to pay $1,700 to the lineal descendants. The trial court and Circuit Court found: "The failure to approve a partial distribution (of $1,700) was a breach of defendant's fiduciary duties." *LeBeau v. United States*, 215 F.Supp.2d 1046, p. 1060; *LeBeau v. United States*, 334 F.Supp.2d 1200, p. 1204; *LeBeau v. United States*, 474 F.3d 1334, p. 1341.

The Secretary of Interior refused to grant permission to the Aberdeen Area Office to make the $1,700 payment in 1982 to each eligible lineal descendant. The Secretary of

[1] "The parties have stipulated, and the Court accepts the stipulation, that the record in LeBeau, Civ. 99-4106, case can be incorporated into the record in this case, which includes a transcript of the court trial held in that case." *LeBeau v. United States*, 334 F.Supp.2d 1200, 1203 (D.S.D. 2004).

Interior has offered no reason throughout the litigation for his refusal to implement the 1972 Distribution Act. The Secretary ignored Congress's clear requirements to pay the Judgment Fund to the lineal descendants.

After 1982, the Tribes attempted to obtain the lineal descendants' 1972 distribution share or a part through litigation and legislative means.

The Tribes were successful and in 1998 Congress passed the 1998 Distribution Act which established a new distribution allocation affecting the trust money held by the Secretary of Interior.

When Congress passed the 1998 Distribution Act, the judgment funds from the 1972 Distribution Act which Congress had appropriated for the lineal descendants remained unpaid. Congress altered the 1972 distribution formula. Congress reduced the lineal descendants' share by 28.3995%. *LeBeau v. United States*, 334 F.Supp.2d at 1201.

The summary of the District Court's holding in *LeBeau v. United States*, 334 F.Supp.2d 1200 is:

(1) That the 1972 Distribution Act created a trust by the deposit of the Judgment Fund in an interest-bearing account under the supervision of the Secretary of Interior;

(2) That the Secretary of Interior had a fiduciary duty under the 1972 Distribution Act to promptly pay the proceeds of the Judgment Fund to the lineal descendants;

(3) That the Secretary of Interior had a fiduciary duty under the Distribution Act to determine the identity of the lineal descendants, and upon identification promptly distribute the Judgment Fund;

(4) That the Secretary of Interior breached his fiduciary duty by not paying the trust funds as directed by Congress in a reasonable time to the lineal descendants;

(5) That the Secretary of Interior further breached his fiduciary duty on two occasions by refusing to approve a partial distribution of $1,700 to the lineal descendants in 1982; and

(6) That the 1972 Distribution Act falls within the ambient of *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (Mitchell II) and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

The District Court determined that the lineal descendants would have received approximately $1,700 in 1982 but for the breach of fiduciary duty by the Secretary of Interior and awarded damages for breach of trust under the 1972 Distribution Act. The District Court then deducted amounts paid after the reallocation under the 1998 Distribution Act resulting in damages of $219.70 plus interest per class member.

The Circuit Court of Appeals' opinion, 474 F.3d 1334 (D.C. Cir. 2007) affirmed the District Court on all liability issues but reversed on damages. The Circuit Court held:

(1) That the 1972 Distribution Act must be read in light of the 1998 Amendment;

(2) That Congress has power to alter judgment funds until such funds are actually vested; and

(3) That Congress's passage of the 1998 amendments reallocated the lineal descendants' share of the Judgment Fund and thereby extinguished the government's liability

for a breach of fiduciary duty by the Secretary because the lineal descendants never acquired vested rights in their share of the Judgment Fund as set forth in the 1972 Distribution Act.

The Petitioner submits that the Circuit Court erred when it determined the 1998 Distribution Act eliminated damages for a violation of fiduciary duties by the Secretary of Interior under the 1972 Distribution Act.

ARGUMENT

A. This Action Seeks to Hold the Secretary of Interior to Account for His Violation of Fiduciary Duties from 1972 until 1986.

This action was submitted to the District Court solely upon the law of trusts under the Little Tucker Act. The Circuit Court affirmed the District Court on all liability issues. The Circuit Court reversed the award of damages by reference to the reallocation of the 1968 Judgment Fund in the 1998 Distribution Act.

The Circuit Court ignored the statutory direction of the General Savings Statute, 1 U.S.C.A. § 109, and eliminated damages under the guise of the 1998 Distribution Act for a violation of trust under the 1972 Distribution Act. The District Court properly recognized that the lineal descendants' claim was based on the Secretary of Interior's refusal to administer the trust funds appropriated by Congress as required by the 1972 Distribution Act for the benefit of the lineal descendants.

The lineal descendants recognize that Congress has "the wide ranging congressional power to alter allotment

plans (and distribution shares) until those plans are executed." *United States v. Jim*, 409 U.S. 80, 82-3 (1972). The petitioner's case is not an issue of Congressional power but a damages action to remedy a serious breach of trust by the Secretary ~~of Interior~~. This case seeks to hold the Secretary of Interior accountable for a knowing and extended refusal to execute his duty under the 1972 Distribution Act.

B. The Circuit Court Affirmed the Liability Judgment that the Secretary of Interior Breached his Fiduciary Duty under the 1972 Distribution Act.

The Circuit Court stated:

> The government, both in briefing and at oral argument, has conceded that the 1972 Distribution Act created a trust responsibility that was breached by the Secretary's unreasonable delay in distributing the Judgment Fund. *LeBeau v. United States*, 474 F.3d 1341.
>
> We agree with the LeBeau plaintiffs that the 1972 Distribution Act created a trust responsibility between the United States and the lineal descendants and that the 1972 Distribution Act governed the government's obligations until Congress amended the Act in 1998. We also agree that as conceded by the government, the Secretary breached this trust responsibility by unreasonably delaying in the partial distribution in 1982 and in the full distribution in 1987 to the lineal descendants of their share of the Judgment Fund. *LeBeau v. United States*, 474 F.3d 1334, 1341-42.

The Circuit Court found that the 1972 Distribution Act imposed trust responsibilities and that *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2002) and *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) permitted compensation for money damage sustained as a result of the breach of the Secretary of Interior's trust responsibility to the Barry LeBeau class. The liability of the Secretary is clear.

C. The Circuit Court's Decision Violates 1 U.S.C.A. § 109, The General Savings Statute and Prior Decisions of this Court.

The District Court followed the rules of construction enacted by Congress in 1 U.S.C.A. § 109. The statute states:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This Court construed the General Savings Statute in *DeLaRama S.S. Co. v. United States*, 344 U.S. 386, 73 S.Ct. 381 (1953). Justice Frankfurter delivered the opinion, a part of which states:

> By the General Savings Statute, Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the statute itself: and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability. p. 383.

The District Court's opinion followed the requirements of the General Savings Statute and the case of *DeLaRama S.S. Co. v. United States*. The Circuit Court decision is in violation of the General Savings Statute because it applies the 1998 Distribution Act statute for damages rather than the 1972 Distribution Act.

> This case demonstrates the concrete, dollars and cents importance of saving the statute and not merely the liability. Indeed, in this case, the liability under the statute is not wholly saved unless that portion of the statute which gives the district court jurisdiction also survives. *DeLaRama S.S. Co.*, *supra*, at 389.

The General Savings Statute saves the entire 1972 Distribution Act. The conceded breach of fiduciary duty under the 1972 Distribution Act creates liability under the Act. The damages must also be determined under the 1972 Distribution Act.

> The precise object of the General Savings Statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations

> of it, or of regulations issued under it, occurring before its expiration. *United States v. Allied Oil Corp.*, 341 U.S. 1, 5, 71 S.Ct. 544, 546, 95 L.Ed. 697 (1951), *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947).

Allen v. Grand Central Aircraft Co., 347 U.S. 535, 554, 74 S.Ct. 745 (1954).

A case explaining the General Savings Statute construed the District of Columbia Workers' Compensation Act of 1928 which was repealed in 1982. The Circuit Court held that under the General Savings Statute, 1 U.S.C.A. § 109, the repeal of the District of Columbia Workers' Compensation Act of 1928 did not result in the forfeiture of remedies available at the time of repeal for injuries incurred prior to the repeal. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (C.A.D.C. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1375 (1987). The *Keener* court held:

> Thus, the repeal of the 1928 Act did not result in a forfeiture of remedies available at the time of the repeal for injuries incurred prior to the repeal, and no more. D.C. Workmens' Compensation claimants seeking damages for pre-July 26, 1982 injuries are entitled to the rights and benefits afforded by the 1928 Act as they then existed, and not as they might be modified by subsequent amendment. *See DeLaRama Steamship Co. v. United States*, 344 U.S. 386, 389-91, 73 S.Ct. 381 (1953).

The Circuit Court ignores the requirements of the General Savings Statute when it applies the 1998 Distribution Act to the damage award. The damages are for

"retrospective" actions. The District Court remedied past violations. The District Court explained:

> The (United States) argument, however, is focused on the Class members' *current* proportionate share of the Judgment Fund, rather than the Class members' share of the Judgment Fund at the time the Court found the Federal Government had breached its trust duties. Considering the trust duties that were breached and time frame in which they were breached, essentially from 1972 to 1987, as more fully explained in the Court's previous opinion, the Court finds the measure of damages is to be based upon the amount of the partial distribution the Class members would have received if the requested partial distribution had been made. *See LeBeau*, 215 F.Supp.2d at 1062-64 (citing *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 557 (8th Cir. 1990) (explaining that a plaintiff must prove his damages with "reasonable certainty")). As was explained in *LeBeau*, 215 F.Supp.2d at 1063, the Class members would have received $1,700 if the partial distribution had been approved. The damages awarded in that case were calculated by decreasing the amount of the above partial distribution by 28.3995 per cent, which was the amount the lineal descendants' share was decreased pursuant to the 1998 Act. This total is $482.79 for each lineal descendant.

LeBeau v. U.S., 334 F.Supp.2d 1200, 1204-5.

Upon affirming the District Court's finding of liability under *Mitchell II*, 463 U.S., 103 S.Ct. 2961, the Circuit Court misconstrued the *Mitchell II* Court's direction for awarding damages.

This case remedies unlawful actions that occurred decades ago. The breach of trust occurred many years ago, prior to 1998. The damages awarded by the District Court for failed actions under the 1972 Distribution Act occurred prior to the 1998 Distribution Act, which changed distribution formulas.

"'Absent a restrospective damages remedy, there would be little to deter federal officials from violating their trust duties, . . . ' *United States v. Mitchell*, 445 U.S. at 550, 100 S.Ct. at 1357 (White, J., Dissenting)" *United States v. Mitchell*, 463 U.S. 206, 227, 103 S.Ct. 2961 (1983).

"A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *Mitchell*, 463 U.S. 206, 227, 103 S.Ct. 2961 (1983).

The General Savings Statute supports the reasoning of the District Court on damages. *Sutherland's* view is that:

> Although these general savings statutes sometimes have been designated as mere rules of construction to be applied only to resolve a question of the legislative intent, the prevalent and more favored view is to construe the savings provisions as positive legislation which should be given effect as though they were incorporated into every future enactment involving a substantive right.

SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:38, p. 582-583.

A proper application of the General Savings Statute, 1 U.S.C.A. § 109, requires affirmance of the District Court and reversal of the Circuit Court's judgments and damages.

D. The Circuit Court Error Was Wrong to Declare that Petitioners' Rights to Payment were not Vested.

The United States Government, the District Court and the Circuit Court all agree: "The Aberdeen Area Office of the BIA requested authority in both March and October of 1982 to make a partial distribution of $1,700 to each eligible lineal descendant but the Secretary denied these requests." *LeBeau v. United States*, 474 F.3d 1337. The unexplained refusal to authorize the mailing of a check for $1,700 to each lineal descendant was found by the District and Circuit Courts to be a breach of trust. The Circuit Court later holds that the reason for not permitting damages was because there would be no "vested" right to the money until it was actually mailed. The District Court found under the 1972 Distribution Act that but for the breach of trust, each beneficiary would have received $1,700. It matters not why or how they received less, the essence of the issue is whether or not the damage in 1982 was $219.70 plus interest.

The Circuit Court held that:

> Each lineal descendant had the right to a timely distribution of his or her per capita share of the lineal descendants' portion of the Judgment Fund. Until the distribution to the lineal descendants occurred, however, Congress had the authority to alter the lineal descendants' portion of the Judgment Fund, thereby reducing the sum of

> money that each lineal descendant would receive. *LeBeau v United States*, 474 F.3d 1342.

The District Court found if the Secretary of Interior had not breached his trust, each lineal descendant would have received $1,700 from 1972 to 1987.

The District Court, however, recognized that the lineal descendants would receive money under the 1998 Distribution Act. The District Court reduced the damage calculation of $1,700 under the 1972 Distribution Act's "retrospective" damage award by the sum to be received.

The District Court relied on the common law of trusts. The District Court quoted BOGERT'S, THE LAW OF TRUSTS AND TRUSTEES § 871 (Revised 2d ed. 2005) which states:

> (a) Any beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief. It is not necessary that his interest be vested.

Here the trustee could have paid the lineal descendants in full at any time between 1972 and 1987. For reasons never explained, the Secretary refused to authorize payment of $1,700 to Mr. LeBeau. Although the claim was not barred by the statute of limitations, other legal actions by the Congress reduced the beneficiaries' recovery under the 1972 Act.

The Circuit Court discusses Congressional power to alter allotments and distribution of tribal lands. LeBeau has never challenged that right, nor Congressional authority to do so. This action is not about allocation but wrongful inaction of the Secretary of Interior.

Damages are demanded for the Secretaries of Interiors' breach of fiduciary duty and unexplained refusal to carry out his trust duties to the beneficiaries under the 1972 Distribution Act. The ultimate "red herring" is that there were no vested rights. The reason there were no payments and the reason for the litigation is because of the Secretary of Interior's unexplained refusal to follow the laws of Congress from 1972 until 1987.

The misinterpretation of the General Savings Statute results in erroneous reasoning. Congressional reallocation of the Judgment Fund in 1998, whether to increase or decrease the share of Mr. LeBeau does not absolve the breach of trust which occurred. The District Court fashioned a remedy based on the damage at the time it occurred. The Circuit Court by ignoring 1 U.S.C.A. § 109 and this Court's precedent whitewashes the breach of fiduciary duty and is error.

THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE ERROR OF LAW OF THE CIRCUIT COURT

This Court should grant Certiorari to remedy a mistake of statutory construction by the Circuit Court of two Acts of Congress, the 1972 and 1998 Distribution Acts.

Additionally, Certiorari should be granted to explain the proper application of the General Savings Statute, 1 U.S.C.A. 109 by the Courts of the United States to enactments of Congress.

Finally, Certiorari should be granted to decide whether damages should be awarded for retrospective

breaches of trust responsibility by Government officials and the proper measure of damages to apply to those breaches of trust.

CONCLUSION

The Petitioner respectfully requests that the Court take jurisdiction of this matter, reverse the decision of the Circuit Court of Appeals and order that the decision of the United States District Court for the Southern Division of South Dakota be reinstated.

DATED this 24th day of April, 2007.

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474 F.3d 1334

United States Court of Appeals
for the Federal Circuit

06-1072

Barry LEBEAU, Individually and on behalf of all other persons similarly situated,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

DECIDED: Jan. 24, 2007.

Before LOURIE, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

The United States appeals from the final judgment of the United States District Court for the District of South Dakota in *LeBeau v. United States,* 334 F. Supp. 2d 1200 (D.S.D. 2004) ("*Barry LeBeau*"). The district court granted summary judgment against the United States in favor of plaintiff Barry LeBeau and a class of similarly situated individuals (collectively "the LeBeau plaintiffs" or "plaintiffs"). The LeBeau plaintiffs sought money damages under the Little Tucker Act, 28 U.S.C. § 1364(a)(2), for the United States' alleged breach of trust, based on what they asserted was the Secretary of the Interior's unreasonable delay in distributing to them their share of the Mississippi Sioux Tribes Judgment Fund ("Judgment Fund"). The

district court determined that the Secretary of the Interior ("the Secretary") had breached his trust duties owed to the LeBeau plaintiffs. Consequently, the court awarded money damages to the plaintiffs in the total amount of $1,827,985.80 and entered judgment accordingly. We hold, however, that the district court erred in its determination that the LeBeau plaintiffs were entitled to money damages as a result of the Secretary's breach of trust. We therefore reverse the court's judgment in favor of the plaintiffs and remand the case to the district court for entry of judgment in favor of the United States.

BACKGROUND

I.

The LeBeau plaintiffs constitute a class of Sisseton-Wahpeton Sioux Tribe lineal descendants who were determined eligible, by applications filed on or before November 1, 1973, to share in the Judgment Fund. The Judgment Fund stems from the United States' breach of treaty obligations under the Treaty of Prairie du Chien, July 15, 1830, 7 Stat. 328, and under the Treaty of Traverse des Sioux, July 23, 1851, 10 Stat. 949 (collectively "the Treaties"). In the Treaties, the Sisseton-Wahpeton Sioux Tribe of the Mississippi and other Indian tribes agreed to cede their lands in exchange for the United States' commitment to make various payments to the tribes and to provide the tribes with other benefits. Subsequently, these tribes claimed that the United States had breached its obligations under the Treaties. In 1967, the Indian Claims Commission approved a settlement of the tribes' claims in the amount of nearly $6 million. The settlement was between the United States and three successors to the signatory Sisseton-Wahpeton Sioux Tribe

of the Mississippi (the Devils Lake Sioux Tribe of North Dakota, the Sisseton-Wahpeton Sioux Tribe of South Dakota, and the Assinoboine and Sioux Tribe of the Fort Peck Reservation in Montana) ("the Tribes"). *Sisseton and Wahpeton Bands v. United States,* 18 Ind. Cl. Comm. 477 (1967). In order to satisfy this judgment, in 1968 Congress appropriated $5,874,039.50 and deposited the money into an interest-bearing trust account in the U.S. Treasury. Act of June 19, 1968, ch. 2, Pub. L. No. 90-351, 82 Stat. 239.

In 1972, Congress enacted the Act of October 25, 1972 ("1972 Distribution Act" or "Act") establishing a formula for the distribution of the Judgment Fund. Under this formula, the lineal descendants of the original Sisseton-Wahpeton Tribe of the Mississippi who were not enrolled in any of the Tribes (the "lineal descendants") were allotted 25.0225% of the Judgment Fund.[1] Pub. L. No. 92-555, 86 Stat. 1168 (codified as amended at 25 U.S.C. § 1300d-22 (2000)). The 1972 Distribution Act specified that each of the Tribes should prepare membership rolls, subject to approval of the Secretary, and that the Secretary should prepare a roll of lineal descendants of the Sisseton-Wahpeton Mississippi Sioux Tribe who were not members of any of the Tribes and distribute funds on a per capita basis to individuals listed on this roll. In 1973, the Secretary issued regulations that established an application procedure for enrollment as a lineal descendant and set a deadline of November 1, 1973, for enrollment applications.

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[1] The 1972 Distribution Act specified that the Devils Lake Sioux Tribe was to receive 21.6892% of the Judgment Fund, the Sisseton-Wahpeton Sioux Tribe of South Dakota was to receive 42.9730%, and the Assiniboine and Sioux Tribe of the Fort Peck Reservation in Montana was to receive 10.3153%. Act of October 25, 1972, 86 Stat. at 1169.

38 Fed. Reg. 13,737 (May 25, 1973) (codified at 25 C.F.R. § 41.1 (1973) and recodified at 25 C.F.R. § 61.4(s) (1995)).

By March of 1982, the Bureau of Indian Affairs ("BIA") had processed all lineal descendant applications and, based on initial eligibility determinations, had determined that there were approximately 1,900 eligible lineal descendants. At the same time, appeals were pending for 500 additional applicants. The Aberdeen Area Office of the BIA requested authority in both March and October of 1982 to make a partial distribution of $1,700 to each eligible lineal descendant, but the Secretary denied these requests. In 1987, the BIA, after resolving the 500 appeals, completed the roll of 1,969 eligible lineal descendants and scheduled payment for May 7, 1987. By this time, each of the Tribes had received payment of its share of the Judgment Fund.

Payment to the lineal descendants of their share of the Judgment Fund was blocked by legal action, however. On May 8, 1987, the Tribes succeeded in obtaining a preliminary injunction from the United States District Court for the District of Montana, enjoining the distribution based on the Tribes' action to eliminate the lineal descendants' share of the Judgment Fund. *Sisseton-Wahpeton Sioux Tribe v. United States,* 686 F. Supp. 831, 832 (D. Mont. 1988), *aff'd* 895 F.2d 588 (9th Cir. 1990). The May 8, 1987 preliminary injunction was vacated in September 1994, but the United States District Court for the District of South Dakota again enjoined distribution to the lineal descendants in January of 1995 when fourteen individuals claimed they had never been notified of the opportunity to apply for enrollment as lineal descendents. *See Loudner v. United States,* 905 F. Supp. 747 (D.S.D. 1995), *rev'd* 108 F.3d 896 (8th Cir. 1997).

In 1998, Congress amended the 1972 Distribution Act through its enactment of the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998 ("1998 Amendments"). The 1998 Amendments applied to any portion of the Judgment Fund not yet distributed. 35 U.S.C. § 1300d (2000). In the 1998 Amendments, Congress reallocated 28.3995% of the undistributed Judgment Fund for the benefit of the governing bodies of the Tribes, *see* 35 U.S.C. § 1300d-23, in an attempt "to ensure that the number of people enrolled as lineal descendants does not result in a per capita windfall of judgment funds being allocated to individuals, when those resources are needed to supply needed capital to assist reservation economies," S. Rep. No. 105-379, at 7 (1998). Congress's action had the effect, of course, of reducing the amount of undistributed funds in the Judgment Fund available for the lineal descendants. Subsequently, the Tribes were paid their additional allocation from the Judgment Fund, while each lineal descendant received his or her share of the funds remaining for the lineal descendants. Eventually, the LeBeau plaintiffs brought the instant action.

II.

The LeBeau plaintiffs' breach-of-trust claim in the present case is identical to the breach-of-trust claim of two lineal descendants in the related *Casimir LeBeau* lawsuit. *See LeBeau v. United States,* 215 F. Supp. 2d 1046 (D.S.D. 2002) ("*Casimir LeBeau II*"); *LeBeau v. United States,* 171 F. Supp. 2d 1009 (D.S.D. 2001) ("*Casimer LeBeau I*"). Because the district court accepted the parties' stipulation that the record in the *Casimir LeBeau* case can be incorporated into the record of the present case, it is instructive to discuss briefly the underlying *Casimir LeBeau* litigation.

A.

On May 25, 1999, two individuals enrolled as lineal descendants (collectively "Casimir LeBeau") filed suit challenging the constitutionality of the 1998 Amendments and seeking damages based upon a Fifth Amendment takings claim and for a breach of trust based on the enactment of the 1998 Amendments and the Secretary's delay in distributing the lineal descendants' share of the Judgment Fund. *Casimir LeBeau I,* 171 F. Supp. 2d at 1013, 1015. The district court dismissed the takings claim on summary judgment, finding that "the lineal descendants did not obtain vested property rights in the Judgment Fund because Congress retained the power to alter the allocation plan until the funds were distributed." *Id.* at 1024. The district court also dismissed on summary judgment Casimir LeBeau's breach-of-trust claim based upon the enactment of the 1998 Amendments, finding that the plaintiffs failed to identify a source of substantive law that could be interpreted as mandating compensation for the breach-of-trust claim. *Id.* at 1027. The district court reserved for trial, however, Casimir LeBeau's breach-of-trust claim based upon the Secretary's delayed distribution of the lineal descendants' share of the Judgment Fund. *Id.* at 1031.

After trial, the district court held that the Secretary's unreasonable delay in distributing the lineal descendants' share of the Judgment Fund constituted a breach of trust and awarded Casimir LeBeau damages under the Little Tucker Act. *Casimir LeBeau II,* 215 F. Supp. 2d at 1062-63. As an initial matter, the district court determined that the six-year statute of limitations did not bar the breach-of-trust claim because the cause of action did not accrue until the plaintiffs first suffered a financial injury in 1998 with

the enactment of the 1998 Amendments. *Id.* at 1058-59. With regard to the merits of the breach-of-trust claim, the district court determined that the Secretary's unreasonable delay with respect to (i) the preparation of the partial distribution of the lineal descendants' share of the Judgment Fund requested in 1982 and (ii) the preparation of the roll and distribution of the lineal descendants' share of the Judgment Fund prior to the 1987 preliminary injunction constituted a breach of trust. *Id.* at 1062. The district court therefore awarded damages in the amount that the individual lineal descendant shares in 1982, at the time of the proposed partial distribution, were decreased pursuant to the 1998 Amendments. *Id.* at 1062-63. The government's appeal of the judgment of the district court in *Casimir LeBeau II* was dismissed on motion per agreement of the parties.

B.

On August 6, 2002, Barry LeBeau filed a breach-of-trust claim for money damages under the Little Tucker Act based upon the Secretary's delay in distributing the lineal descendants' share of the Judgment Fund.[2] *Barry LeBeau,*

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[2] The Little Tucker Act provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1346(a)(2).

(Continued on following page)

334 F. Supp. 2d at 1201. The district court certified the action as a class action, defining the class as "[a]ll Sisseton and Wahpeton Sioux Tribe lineal descendants who were determined to be eligible, by application filed on or before November 1, 1973, to share in the judgment fund . . . to be distributed pursuant to [the 1972 Distribution Act]." *Id.* at 1202. In due course, the parties cross-moved for summary judgment. *Id.* at 1201.

On August 18, 2004, the district court granted the LeBeau plaintiffs' motion for summary judgment and denied the government's cross-motion. *Id.* In granting the LeBeau plaintiffs' motion, the district court concluded that the 1972 Distribution Act "establishes fiduciary obligations of the Government in preparing the roll of lineal descendants and distributing the funds" and that it "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Id.* at 1204 (citation omitted). The district court relied on its reasoning in the *Casimir LeBeau* litigation, finding that the

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The Little Tucker Act grants jurisdiction, concurrent with the United States Court of Federal Claims, to federal district courts for the same types of claims allowed by the Tucker Act that do not exceed $10,000. The Little Tucker Act itself does not create a substantive right for money damages against the United States. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"). Plaintiffs must identify a substantive right in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained," *Mitchell II*, 463 U.S. at 217. In this case, the district court had jurisdiction under the Little Tucker Act over each of the LeBeau plaintiffs' individual claims for money damages, which did not exceed $10,000, as a result of the Secretary's alleged breach of the trust arising under the 1972 Distribution Act. *Barry LeBeau*, 334 F. Supp. 2d at 1201.

government had breached trust duties owed to the LeBeau plaintiffs by (i) unreasonably delaying the requested 1982 partial distribution and (ii) unreasonably delaying the preparation of the roll and the distribution of the lineal descendants' share of the Judgment Fund prior to the 1987 injunction. *Id.* Additionally, the district court stated that it found no persuasive reason to alter its earlier *Casimir LeBeau* decision that the breach-of-trust claims were not barred by the six-year statute of limitations. *Id.* As in *Casimir LeBeau,* the district court in the present case found that the appropriate measure of damages was based upon the partial distribution the LeBeau plaintiffs would have received if the requested partial distribution had been made. *Id.* at 1205. On May 6, 2005, the district court entered judgment in favor of the LeBeau plaintiffs, awarding each class member damages in the amount of $919.51, for a combined total award against the United States of $1,827,985.80.

After judgment was entered, the government filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(2).

DISCUSSION

I.

Our task is "to determine whether [the lower court's decision] is premised on errors of law or clearly erroneous factual findings."[3] *Hendler v. United States,* 175 F.3d 1374,

[3] Although our review of a grant of summary judgment is usually "de novo," the standard of review differs in this case because the district court in the present case adopted and relied on findings of fact from the earlier *Casimir LeBeau* litigation.

1378 (Fed. Cir. 1999). This standard gives "considerable deference" to the lower court's factual findings, but conclusions of law are "subject to full and independent review." *Id.* (citing *Gardner v. TEC Sys. Inc.*, 725 F.2d 1338, 1344 (Fed. Cir. 1984)). In any event, in this case the pertinent facts are not in dispute.

"Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be 'unequivocally expressed.'" *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2002) (quoting *United States v. Mitchell,* 445 U.S. 535, 538 (1980) ("*Mitchell I*")). A statute creates a right capable of grounding a claim for damages within the waiver of sovereign immunity if the statute "can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* (quoting *United States v. Mitchell,* 463 U.S. 206, 217 (1983) ("*Mitchell II*")).

Consequently, in order to properly raise a breach-of-trust claim for damages against the United States, a plaintiff must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government failed faithfully to perform those duties." *United States v. Navajo Nation,* 537 U.S. 488, 506 (2002). Once a plaintiff identifies a source of law and alleges the government's failure, the court must determine "whether the relevant source of law 'can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Id.* (quoting *Mitchell II,* 463 U.S. at 219).

III.

A.

The district court in *Casimir LeBeau I* determined that the 1972 Distribution Act imposed "fiduciary obligations on the Secretary because the United States retains control over tribal monies while the Secretary is preparing the roll." 171 F. Supp. 2d at 1028. For their part, the parties do not dispute that the 1972 Distribution Act imposed trust responsibilities and can be fairly interpreted under *White Mountain* and *Mitchell II* as mandating compensation for damages sustained as a result of a breach of those duties. Instead, the parties contest which version of the Distribution Act – the 1972 version as enacted or the 1998 version as amended – governs the substantive rights of the lineal descendants.

The LeBeau plaintiffs argue that the 1972 Distribution Act created a trust responsibility requiring the Secretary to prepare the roll of lineal descendants and to distribute to the lineal descendants their share of the Judgment Fund in a timely manner. The plaintiffs contend that the government breached this trust responsibility by unreasonably delaying the partial distribution in 1982 and the full distribution in 1987 and that the government's breach had the effect of leaving a corpus of money in the Judgment Fund, which Congress was able to reallocate through the 1998 Amendments. According to the LeBeau plaintiffs, if the Secretary had timely distributed the Judgment Fund, this corpus of money would not have remained in existence in 1998, the result being that there would have been no way for Congress to reduce the share of the fund allocated to the lineal descendants by the original terms of the 1972 Distribution Act. The LeBeau plaintiffs do not challenge the proposition that Congress

had the authority to reallocate the Judgment Fund. Instead, they maintain that Congress's amendment of the 1972 Distribution Act cannot cancel the government's liability for the delayed distribution of the Judgment Fund.

The government, both in briefing and at oral argument, has conceded that the 1972 Distribution Act created a trust responsibility that was breached by the Secretary's unreasonable delay in distributing the Judgment Fund. The government, however, argues that the 1972 Distribution Act, as amended by the 1998 Amendments, should govern the substantive rights of the lineal descendants. The government therefore reasons that no breach occurred because the Secretary, under the 1998 Amendments, had no duty to distribute the disputed 28.3995%[4] of the Judgment Fund to the lineal descendants. Additionally, the government contends that no causal link existed between the Secretary's decisions regarding the distribution of the Judgment Fund and Congress's action to amend the 1972 Distribution Act.

B.

We agree with the LeBeau plaintiffs that the 1972 Distribution Act created a trust responsibility between the United States and the lineal descendants and that the 1972 Distribution Act governed the government's obligations until Congress amended the Act in 1998.[5] We also

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[4] As noted above, this is the percentage of the money remaining in the Judgment Fund in 1998, which Congress directed in the 1998 Amendments be allocated to the Tribes.

[5] The terms of the 1972 Distribution Act created a trust responsibility because the United States retained control over tribal monies

(Continued on following page)

agree that, as conceded by the government, the Secretary breached this trust responsibility by unreasonably delaying in the partial distribution in 1982 and in the full distribution in 1987 to the lineal descendants of their share of the Judgment Fund. We hold, however, that the LeBeau plaintiffs are not entitled to a recovery of damages for this breach because Congress, acting within its proper authority before any distribution to the lineal descendants occurred, reallocated the lineal descendants' share of the Judgment Fund.

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while the Tribes were preparing their rolls subject to the Secretary's approval, and while the Secretary was preparing the roll of lineal descendants. *See Mitchell II,* 463 U.S. at 225 ("'[Where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust, or fiduciary connection.'") (quoting *Navajo Tribe of Indians v. United States,* 224 Ct. Cl. 171, 183 (1980)). Section 202 of the Act provided in relevant part:

> (b) The shares of [the Tribes], as apportioned in accordance with subsection (a), shall be placed on deposit in the United States Treasury to the credit of the respective groups. Seventy per centum of such funds shall be distributed per capita to their tribal members: *Provided,* That none of the funds may be paid per capita to any person whose name does not appear on the rolls prepared pursuant to section 201(a) of this Act. The remainder of such funds may be advanced, deposited, expended, invested or reinvested for any purpose designated by the respective tribal governing bodies and approved by the Secretary of the Interior. . . .
>
> (c) The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a), shall be distributed per capita to the persons enrolled on the roll prepared by the Secretary pursuant to section 201(b) of this Act.

86 Stat. at 1169 (alteration in original).

C.

Critical to our resolution of this case is a determination of what rights the 1972 Distribution Act created for the lineal descendants. Under the 1972 Distribution Act, each lineal descendant had the right to a timely distribution of his or her per capita share of the lineal descendants' portion of the Judgment Fund. Until the distribution to the lineal descendants occurred, however, Congress had the authority to alter the lineal descendants' portion of the Judgment Fund, thereby reducing the sum of money that each lineal descendant would receive. *See, e.g., Del. Tribal Bus. Comm. v. Weeks,* 430 U.S. 73, 90 (1977) ("The distribution . . . has not yet occurred, and Congress has the power to revise its original allocation"); *N. Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 653-56 (1976) ("The Court has consistently recognized the wide ranging congressional power to alter allotment plans until those plans are executed."); *United States v. Jim,* 409 U.S. 80, 82-83 (1972) ("[I]t was well within the power of Congress to alter that distributional scheme."); *Gritts v. Fisher,* 224 U.S. 640, 648 (1912) ("[The allotment and distribution of tribal lands and funds were] but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.").

In the circumstances of this case, where Congress did act to reallocate the lineal descendants' share of the Judgment Fund, the lineal descendants' recovery of damages for a breach-of-trust claim based on the Secretary's delayed distribution depends upon the lineal descendants having vested rights in the Judgment Fund. If the lineal descendants' rights in the Judgment Fund had

vested (that is, the lineal descendants had already received their distribution), Congress could not have deprived them of their share of the Judgment Fund without damages consequences under either a breach-of-trust claim or a takings claim. *See Gritts,* 224 U.S. at 647-48 (approving a Congressional enlargement of the pool of beneficiaries who were to benefit from a distribution of tribal property despite an earlier statute that had established a more limited pool); *id.* at 648 ("But that [allotment and distribution act] did not confer upon [the beneficiaries] any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution."). In this case, although each lineal descendant did have a right to a timely distribution of his or her per capita share of the Judgment Fund, the lineal descendants did not have vested rights in the Judgment Fund. *See United States v. Rowell,* 243 U.S. 464, 468-71 (1917) ("[S]tatutes of this type are not to be regarded as proposals by the government to enter into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be devested or impaired."); *Gritts,* 224 U.S. at 648. The lineal descendants' right to their per capita share of the Judgment Fund was always subject to modification by Congress until distribution of their share occurred, which would vest the lineal descendants' rights in the Judgment Fund. Since no action occurred that had the effect of vesting the lineal descendants' share of the Judgment Fund as set forth in the 1972 Distribution Act, the lineal descendants are not entitled to recover damages for a reduction in their share of the Judgment Fund.

In sum, Congress's reallocation of the lineal descendants' share of the Judgment Fund extinguished the government's liability for a breach by the Secretary because the lineal descendants never acquired vested rights in their share of the Judgment Fund as set forth in the 1972 Distribution Act.[6] To permit recovery for a breach-of-trust claim in a case such as this, in which Congress acted to change the allotment for the lineal descendants prior to any distribution, would defeat Congressional intent. The legislative history of the 1998 Amendments indicates that Congress enacted the new distribution formula "in order to correct its earlier error in allocating an excessive amount of the judgment fund to lineal descendants." S. Rep. No. 105-379, at 8.

CONCLUSION

For the foregoing reasons, the judgment of the district court in favor of the LeBeau plaintiffs is reversed. The case is remanded to the district court for entry of judgment in favor of the United States.

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[6] We recognize that requiring the LeBeau plaintiffs to have vested rights in the Judgment Fund in order to recover damages for a breach-of-trust claim could be viewed as contradictory to the common law of trusts. According to Bogert's *The Law of Trust & Trustees* § 871 (rev. 2d ed. 2005), "[a]ny beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief. It is not necessary that his interest be vested." Although the common law of trusts does not require a beneficiary to have a vested interest in order to bring a breach-of-trust claim, in the special circumstances of the present case, the LeBeau plaintiffs must have had vested rights in the Judgment Fund in order to recover damages given that Congress acted to reallocate their share.

COSTS

Each party shall bear its own costs.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BARRY LEBEAU, Individually and on on behalf of all other persons similarly situated,	*	CIV 02-4168
	*	MEMORANDUM OPINION AND ORDER
Plaintiff,	*	(Filed Aug. 18, 2004)
-vs-	*	
UNITED STATES OF AMERICA,	*	
Defendant.	*	

The parties filed cross motions for summary judgment, Docs. 52 and 65. The motions have been fully briefed and the Court heard oral argument on the motions on August 9, 2004, where the Class was represented by class counsel, J.M. Grossenburg and Mark Meierhenry, and class representative Barry LeBeau, and the Defendant was represented by Assistant United States Attorney Jan Holmgren. During the hearing, the parties stipulated that the record in the case of *LeBeau v. United States,* CIV 99-4106 (D.S.D.) can be incorporated into the record of this case. Having carefully considered the parties' written submissions and oral argument, the Court will grant Plaintiff's Motion for Summary Judgment and will deny Defendant's Motion for Summary Judgment.

BACKGROUND

Plaintiff filed this action pursuant to the "Little" Tucker Act, 28 U.S.C. § 1364(a)(2), seeking an award of money damages for the Defendant's breach of trust in unreasonably delaying the distribution of a judgment fund, which resulted in Plaintiff's share in the fund being decreased by 28.3995% when Congress enacted the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998 ("the 1998 Act"), Pub.L. No. 105-387, 112 Stat. 3471 (codified at 25 U.S.C. § 1300d-21 *et seq.*). The fund was appropriated in 1968, Pub.L. No. 90-532, 82 Stat. 239, and in 1972 Congress allocated 25.0225% of the fund for distribution to Sisseton and Wahpeton Mississippi Sioux Tribe lineal descendants who were not members of certain listed tribes. *See* Pub.L. No. 92-555, 86 Stat. 1168 (codified at 25 U.S.C. § 1300d, *et seq.* (1983) (amended 1998)). For ease of reference, the Court will refer to this fund as "the Judgment Fund." In order to distribute the Judgment Fund, Congress directed that a roll of lineal descendants be prepared. *See* 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c) (1983) (amended 1998). Plaintiff claims that Defendant is liable for unreasonably delaying the preparation of the roll, which was a prerequisite to distribution of the lineal descendants' share of the Judgment Fund. The 1998 Act reallocated 28.3995% of the lineal descendants' share of the Judgment Fund to the tribes who were also beneficiaries of the Judgment Fund in 1972. The tribes received their distributions from the Judgment Fund years before they lobbied Congress to enact the 1998 Act. Thus, the only money remaining in the Judgment Fund was allocated to the lineal descendants at the time the 1998 Act was enacted.

This action was filed after the Court denied class certification in an action entitled *Casimir LeBeau v. United States,* CIV 99-4106 (D.S.D.), wherein the plaintiffs alleged the same claim the Plaintiff alleges in the present action. As mentioned above, the parties have stipulated that the record in the *LeBeau* case, CIV 99-4106, can be incorporated into the record of the present case. In an Order filed on February 5, 2002, the Court refused to certify a class in CIV 99-4106 because the motion for class certification was untimely. *See LeBeau,* CIV 99-4106 (Doc. 107, Feb. 5, 2002). The merits of the class certification issue were not addressed by the Court in the *LeBeau* case, CIV 99-4106.

The two plaintiffs in *LeBeau,* CIV 99-4106, prevailed on their breach-of-trust claim for delay, which is the same claim alleged by Plaintiff and the class in this action, and they were each awarded $482.79 plus interest. *See LeBeau v. United States.* 215 F.Supp.2d 1046, 1064 (D.S.D. 2002). The damage award was calculated based upon a partial distribution that the Bureau of Indian Affairs' ("BIA") Aberdeen Area Office requested to make to approximately 1,900 lineal descendants in 1982. *See id.* at 1051, 1062-63. The amount of the partial distribution would have been $1,700 per lineal descendant if the BIA would have approved it. *See id.* The damages were calculated by multiplying the partial distribution of $1,700 by 28.3995%, which was the amount the lineal descendants' share was decreased pursuant to the 1998 Act. Plaintiff and the other class members seek a similar award of money damages in this action, with the only difference being an increase in the interest award for the additional time that has elapsed since the two plaintiffs in *LeBeau,* CIV 99-4106 recovered on their breach of trust claim.

The Court stayed this action on March 4, 2003 pending a final determination in *LeBeau*, CIV 99-4106. Although the plaintiffs and the defendant in *LeBeau*, CIV 99-4106, appealed the Court's decision in that case, the appeals were dismissed on agreement of the parties. After the appeals were dismissed in that case and it was final, the stay in the present case was dissolved on August 12, 2003. (Order Lifting Stay, Doc. 9.)

The Court certified this action as a class action and defined the class as follows:

> All Sisseton and Wahpeton Sioux Tribe lineal descendants who were determined to be eligible, by application filed on or before November 1, 1973, to share in the judgment fund appropriated in 1968, Pub.L. No. 105-387, 112 Stat. 3471, and to be distributed pursuant to the Act of October 25, 1972, codified at 25 U.S.C. § 1300d, *et seq.* (1983). Excluded from this class are those persons who timely request exclusion from this class, as well as Casimer LeBeau and Vernon Ashley.

DISCUSSION

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986). In reviewing a motion for summary judgment, this Court views the evidence in a light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). "Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit

or otherwise' designate 'specific facts showing that there is a genuine issue for trial.'" *Commercial Union Ins. Co. v. Schmidt,* 967 F.2d 270, 271 (8th Cir. 1992) (quoting Fed.R.Civ.P. 56(e)).

The parties have stipulated, and the Court accepts the stipulation, that the record in the *LeBeau,* CIV 99-4106, case can be incorporated into the record in this case, which includes a transcript of the court trial held in that case. The facts and claims asserted by the Plaintiff class in this action were also asserted by the two plaintiffs in *LeBeau,* CIV 99-4106. The Court issued three published opinions in *LeBeau,* CIV 99-4106, which describe in detail the factual and legal claims asserted by the two plaintiff lineal descendants. *See LeBeau v. United States,* 115 F.Supp.2d 1172 (D.S.D. 2000) (decision on three Tribe's motions to intervene and dismiss the action); *LeBeau v. United States,* 171 F.Supp.2d 1009 (D.S.D. 2001) (holding that the lineal descendants did not have a vested property interest to prevail on their Fifth Amendment takings claims and denying summary judgment on plaintiffs' breach of trust claim); *LeBeau,* 215 F.Supp.2d at 1062 (holding that the government breached its trust duties by unreasonably delaying a requested partial distribution of the Judgment Fund and unreasonably delaying the preparation of the roll and distributing the Judgment Fund). In deciding the breach of trust issues, the Court found the *LeBeau* case was governed by the Supreme Court's decision in *United States v. Mitchell,* 463 U.S. 206, 219-28 (1983) (*Mitchell II*), which held that statutes and regulations giving the Federal Government full responsibility to manage certain Indian resources and land for the benefit of the Indians established fiduciary duties of the government, the government breached those duties, and those statutes and

regulations could be fairly interpreted as mandating compensation for money damages caused by the breach. *See LeBeau,* 171 F.Supp.2d at 1028-29; *LeBeau,* 215 F.Supp.2d at 1058-59. In an earlier related decision, the Supreme Court held that a general allotment act did not render the United States answerable in money damages for alleged mismanagement of the same Indian resources and land at issue in *Mitchell II. See United States v. Mitchell,* 445 U.S. 535, 546 (1980) (*Mitchell I*).

During the hearing on August 9, 2004, the Court asked the parties to set forth their views on how the present case is distinguishable from the related *LeBeau* case, CIV 99-4106. Neither Plaintiff nor Defendant identified any factual differences between the two cases. Plaintiff argued, in part, that this Court's prior decisions on the plaintiff's breach of trust claim in *LeBeau,* CIV 99-4106, are supported by the Supreme Court's recent decision in *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003). In *White Mountain,* the Supreme Court held that the statute under consideration, creating a Tucker Act right, was reasonably amenable to the reading that it mandates a right of recovery in money damages against the United States. 537 U.S. at 471-72. In reaching this decision, the Supreme Court evaluated whether the statutes and regulations fell within *Mitchell I* or *Mitchell II*'s governance, and concluded the case was aligned with *Mitchell II. See Mitchell II,* 537 U.S. at 472-79. In contrast, Defendant contends that this case is governed by the Supreme Court's opinion in *United States v. Navajo Nation,* 537 U.S. 488, 507-08, 514 (2003), which was issued on the same day as *White Mountain,* and held that the statutes and regulations under consideration were aligned with *Mitchell I* and did not create a fiduciary duty

enforceable in an action for damages under the Indian Tucker Act.

The Court recognizes that the Class in this case is not entitled to the benefit of the collateral estoppel doctrine because the Supreme Court held that "nonmutual offensive collateral estoppel is not to be [used against] the United States." *United States v. Mendoza,* 464 U.S. 154, 158 (1984) (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979)). Thus, the Court has considered the Defendant's arguments rather than finding it is barred from litigating the claims asserted by the Class. Having reviewed the decisions in *LeBeau,* 171 F.Supp.2d at 1028-31 and *LeBeau,* 215 F.Supp.2d at 1049-64, in light of the Supreme Court's decisions in *White Mountain, supra,* and *Navajo Nation, supra,* the Court finds the present case is governed by the Supreme Court's decision in *Mitchell II,* 463 U.S. at 218-28, rather than the decision in *Mitchell I,* 445 U.S. at 538-46. The Court again concludes that the 1972 Act establishes fiduciary obligations of the government in preparing the roll of lineal descendants and distributing the funds in the Judgment Fund and that it "can 'fairly be interpreted as mandating compensation by the Federal Government for damages sustained.'" *LeBeau,* 171 F.Supp.2d at 1029 (quoting *Mitchell II,* 463 U.S. at 226). For the reasons stated in the Court's decisions in *LeBeau,* 215 F.Supp.2d at 1059-62, the Court further finds that the Federal Government breached its trust duties owed to the Class members by unreasonably delaying the partial distribution requested in 1982 and by unreasonably delaying the preparation of the roll and distributing the Judgment Fund prior to the issuance of a Montana court's preliminary injunction on May 8, 1987, which injunction was explained in *LeBeau,* 171 F.Supp.2d at 1013-14, and *LeBeau,* 215 F.Supp.2d at 1051-52.

One of the issues raised again by the Defendant is that the lineal descendants' breach of trust claims are barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). The Court fully examined and rejected the statute of limitations' issues in *LeBeau,* 215 F.Supp.2d at 1054-59, and finds no persuasive reason to alter that decision.

The remaining issue is whether the Class members are entitled to recover the same amount of damages as the two lineal descendants in *LeBeau,* CIV 99-4106. Defendant asserts that the Court's calculation of damages in *LeBeau,* 215 F.Supp.2d at 1063-64, should not be applied to the Class members because the total number of lineal descendants currently eligible to share in the Judgment Fund is 7,116, which number was unknown when the Court calculated and awarded damages in *LeBeau,* 215 F.Supp.2d at 1063-64. The Defendant's argument, however, is focused on the Class members *current* proportionate share of the Judgment Fund, rather than the Class members' share of the Judgment Fund at the time the Court found the Federal Government breached its trust duties. Considering the trust duties that were breached and the time frame in which they were breached, essentially from 1972 to 1987, as more fully explained in the Court's previous opinion, the Court finds that the appropriate measure of damages is to be based upon the amount of the partial distribution the Class members would have received if the requested partial distribution had been made. *See LeBeau,* 215 F.Supp.2d at 1062-64 (citing *John Morrell & co. v. Local Union 304A*, 913 F.2d 544, 557 (8th Cir. 1990) (explaining that a plaintiff must prove his damages with "reasonable certainty")). As was explained in *LeBeau,* 215 F.Supp.2d at 1063, the Class members would have received $1,700 if the partial distribution had been approved. The damages awarded in that case were calculated by decreasing the amount of the above

partial distribution by 28.3995 per cent, which was the amount the lineal descendants' share was decreased pursuant to the 1998 Act. This total is $482.79 for each lineal descendant.

After the decision in *LeBeau*, 215 F.Supp.2d at 1063-64 was issued, the Court required the parties to submit supplemental briefs on the issue of interest. The Court found that the principal portion of the $482.79 figure explained above was $219.70 and the interest portion was $263.09. The Court was required to designate a date as the ending period for the accrual of interest because the Office of Trust Funds Management ("OTFM") could not provide a daily accrual rate that could be used prospectively by the Court to calculate interest as the interest rate on the Judgment Fund changes daily. Recognizing the difficulty in calculating interest, the two plaintiffs in *LeBeau,* CIV 99-4106, agreed to an ending date for the calculation of interest damages. The Court will direct the parties to negotiate an ending date for the calculation of interest damages. If the parties are able to reach a decision on the ending date, the defendant will be directed to submit an interest calculation on the principal portion of the 1982 figure, i.e., $219.70, from January 1, 1983 to the agreed upon date. If the parties are unable to agree upon an ending date, each side shall submit a separate proposal for an ending date. Accordingly,

IT IS ORDERED:

1. That the record in the case *LeBeau v. United States,* CIV 99-4106 (D.S.D.) is incorporated into the record of the present case.

2. That Plaintiff's Motion for Summary Judgment, Doc. 52, is granted.

3. That Defendant's Motion for Summary Judgment, Doc. 65, is denied.

4. That the parties shall attempt to reach an agreement on the ending date for purposes of the calculation of interest. If the parties are unable to reach an agreement, they shall submit a separate proposal for an ending date to the Court on or before August 25, 2004.

5. That if the parties reach an agreement on the ending date, on or before August 25, 2004, the Defendant shall submit an interest calculation on the principal portion of the 1982 figure, i.e., $219.70, from January 1, 1983 to the agreed upon date.

6. That, on or before September 1, 2004, Plaintiff shall submit to the Court a proposed notice to the Class that a common fund has been determined by Order of the Court and advising that class members who timely submit a proof of claim may participate in the distribution of the recovery proceeds. Plaintiff shall also submit a proposed proof of claim form.

Dated this 18th day of August, 2004.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK
/s/ BY: Linda M. Ziegler
DEPUTY

171 F.Supp.2d 1009

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CASIMER LeBEAU and VERNON ASHLEY, on behalf of themselves and all other persons similarly situated, Plaintiffs, -vs- UNITED STATES OF AMERICA, Defendant, and THE SISSETON-WAHPETON SIOUX TRIBE; SPIRIT LAKE TRIBE; and THE SISSETON-WAHPETON SIOUX COUNCIL OF THE ASSINIBOINE & SIOUX TRIBES, Intervenors-Defendants.	CIV 99-4106 MEMORANDUM OPINION AND ORDER (Filed Sep. 25, 2001)

The plaintiffs, Casimir LeBeau and Vernon Ashley, filed a motion to amend the complaint, Doc. 51, and a second motion for judgment on the pleadings, Doc. 60. The defendant, United States, filed a motion for summary judgment, Doc. 66. The intervenors-defendants, the Sisseton-Wahpeton Sioux Tribe, the Spirit Lake Tribe and

the Sisseton-Wahpeton Sioux Council of the Assiniboine and Sioux Tribes ("the Tribes") filed a motion for summary judgment, Doc. 62. A hearing on the pending motions was held on May 18, 2001, with the plaintiffs appearing by their counsel, J.M Grossenburg, the United States appearing by its counsel, Assistant United States Attorney Jan L. Holmgren, and with the Tribes appearing by their counsel, Bertram E. Hirsch. Having taken the motions under advisement, the Court now grants plaintiffs' motion to amend the complaint and denies the second motion for judgment on the pleadings. The United States' motion for summary judgment is granted in part and denied in part. The Tribes' motion for summary judgment is granted in part and denied in part.

I. FACTUAL BACKGROUND

This action was filed by the plaintiffs to challenge the constitutionality of a recently enacted law which has the effect of diminishing, by at least 28.3995%, the funds appropriated by Congress in 1968, plus accumulated interest, and allocated in 1972 for the benefit of plaintiffs and others similarly situated to satisfy a final judgment entered by the Indian Claims Commission[1] relating to the United States' breach of two treaties[2] involving approximately 27 million acres of land ceded to the United States

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[1] *Sisseton and Wahpeton Bands or Tribes, et al. v. United States,* 18 Ind.Cl.Comm. 526-1 (1967).

[2] The Sisseton and Wahpeton Sioux Tribes ceded approximately two million acres of land to the United States by the Treaty of Prairie du Chien of July 15, 1830 (7 Stat. 328) and approximately 25 million acres of land by the Treaty of Traverse des Sioux of July 23, 1851 (10 Stat. 949). *See Sisseton-Wahpeton Sioux Tribe v. United States,* 686 F.Supp. 831, 833 (D.Mont. 1988) (subsequent history omitted).

by the Sisseton and Wahpeton Sioux Tribes in the 19th century. *See* Pub.L. No. 105-387, 112 Stat. 3471 (codified at 25 U.S.C. § 1300d-21 *et seq.* (2001)). Pursuant to the Act of June 19, 1968 Congress appropriated nearly $6 million to satisfy the judgment entered by the Indian Claims Commission (hereinafter referred to as "the Judgment Fund"). *See* Pub.L. No. 90-352, 82 Stat. 239. In the Act of October 25, 1972 ("the 1972 Act"), Congress allocated 25.0225% of the nearly $6 million Judgment Fund for distribution to Sisseton and Wahpeton Mississippi Sioux Tribe lineal descendants (hereinafter referred to as "lineal descendants") who were not members of the tribes listed in the 1972 Act but could trace lineal ancestry to tribal members listed on rolls acceptable to the Secretary of the Interior ("Secretary"). *See* Pub.L. No. 92-555, 86 Stat. 1168 (codified at 25 U.S.C. § 1300d, *et seq.* (1983) (amended 1998)). The number of lineal descendants who were not members of the three successor tribes was unknown at the time the 1972 Act was enacted. *See* S.Rep. No. 92-144, at 7 (1971). Plaintiffs are lineal descendants who have been determined to be eligible to share in the distribution pursuant to the 1972 Act, but who, to this day, have not received any funds pursuant to the 1972 Act. In October 1998, the lineal descendants' share was estimated to be worth approximately $15.2 million. *See* S.Rep. No. 105-379, at 3 (1998).

In an action filed in the Montana district court in 1987, the Tribes challenged the validity of the portion of the 1972 Act which allocates 25.0225% of the Judgment Fund to the lineal descendants. *See Sisseton-Wahpeton Sioux Tribe v. United States,* 686 F.Supp. 831 (D. Mont. 1988) ("*Sisseton I*") (subsequent history omitted). The Montana District Court held that the plaintiff Tribes' claims were barred by the statute of limitations, finding

that the Tribes had waited nearly fifteen years to challenge Congress' allocation of the Judgment Fund. *See id.* at 834, 837-38. The Ninth Circuit Court of Appeals agreed the Tribes' claims regarding the lineal descendants' share of the Judgment Fund were time-barred. *See Sisseton-Wahpeton Sioux Tribe v. United States,* 895 F.2d 588, 597 (9th Cir.), *cert. denicd,* 498 U.S. 824 (1990) ("*Sisseton II*"). On remand for consideration of the possibility of amending the complaint, the Montana District Court granted summary judgment to the United States and the Ninth Circuit again affirmed the denial of relief to the Tribes. *See Sisseton-Wahpeton Sioux Tribe v. United States,* 90 F.3d 351, 356 (9th Cir.), *cert. denied,* 519 U.S. 1011 (1996) ("*Sisseton III*"). During the pendency of the Tribes' claims in the federal court system, the lineal descendants did not receive any of the funds allocated to them by the 1972 Act. In 1994, individuals claiming to be lineal descendants eligible to share in the Judgment Fund brought an action contending they were not given notice of the Judgment Fund and seeking to share in the 25.0225% allocated to the lineal descendants pursuant to the 1972 Act. *See Loudner v. United States,* 108 F.3d 896 (8th Cir. 1997). The Eighth Circuit ruled that the plaintiffs' claims in *Loudner* were not time-barred, *id.* at 903-04, and the Secretary is currently in the process of determining how many additional lineal descendants will share in the Judgment Fund allocated to the lineal descendants, *see Loudner v. United States,* CIV 94-4294 (D.S.D.) (on remand).

In 1998, Congress enacted the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998 ("the 1998 Act"), which is the subject of the present action. *See* 25 U.S.C. § 1300d-21 *et seq.* (2001). Pursuant to the 1998 Act, the Tribes will receive at least 28.3995% of the lineal

descendants' share of the Judgment Fund allocated to the lineal descendants in the 1972 Act if a final judgment is not entered in favor of one or more lineal descendants in this action. *See* 25 U.S.C. §§ 1300d-23(a)(1), 1300d-26, and 1300d-27 (2001). If a final judgment is entered in favor of one or more lineal descendants in this action, the Tribes will not receive a distribution under the 1998 Act, and the lineal descendants will receive the share of the Judgment Fund allocated to them in the 1972 Act. *See* 25 U.S.C. § 1300d-27(e) (2001).

The United States moves for summary judgment, contending that: 1) the Court does not have jurisdiction over plaintiffs' claim that the United States breached a trust duty owed to the plaintiffs as a result of Congress' enactment of the 1998 Act; 2) the United States did not breach a trust duty owed to plaintiffs by failing to distribute plaintiffs' shares of the Judgment Fund; and 3) the enactment of the 1998 Act did not constitute a taking of plaintiffs' property without payment of just compensation under the Fifth Amendment. In support of the above contentions, the United States argues that no common law trust duties exist and any trust duties owed to plaintiffs would arise from either the 1972 Act or the 1998 Act. The only alleged breach of trust, the United States contends, is for failure to distribute the money to the lineal descendants within a reasonable time and manner. Asserting that a six-year statute of limitations applies to plaintiffs' breach-of-trust claim, the United States contends that any delay in distribution of the Judgment Fund between 1972 and 1987 is time-barred. Moreover, the United States asserts that the Secretary has been carrying out the duty to prepare the rolls required by 25 U.S.C. § 1300d-3(b) (1983) (amended 1998), and that any delay in the preparation of

the rolls has been caused by persistent litigation involving the Judgment Fund spanning several years. The United States contends the plaintiffs lack a private property interest in the Judgment Fund, which is required to prevail on their takings' claim, because the lineal descendants never obtained a vested right in the fund. When Congress enacted the 1998 Act, the United States argues, it had the power to revise the original allocation of the Judgment Fund, as set forth in the 1972 Act, because the money remained tribal property and had not yet been distributed to the lineal descendants. The United States claims that Congress was providing for the disposition of tribal property, rather than individual property, when it enacted the 1972 Act. The United States argues that plaintiffs will not possess a vested property right in the Judgment Fund until distribution occurs, or at the earliest, when the Secretary prepares the roll of eligible lineal descendants as required by 25 U.S.C. § 1300d-3(b) (2001). Even if plaintiffs possessed a vested property interest in the Judgment Fund, the United States contends plaintiffs' taking claim fails because none of the Judgment Fund was taken for "public use" under the Fifth Amendment.

The Tribes advance many of the same arguments made by the United States and incorporate its arguments in support of the Tribes' motion for summary judgment. Citing Congress' plenary power over Indian affairs, the Tribes contend the 1998 Act is valid because Congress possessed the power, prior to distribution, to reallocate a portion of the Judgment Fund from the lineal descendants to the Tribes. The Tribes contend plaintiffs lack a constitutionally protected property interest in the Judgment Fund because: 1) plaintiffs never had the right to possess, use or dispose of the Judgment Fund; 2) plaintiffs could not

acquire an individual property interest in the Judgment Fund, which was awarded to compensate the Tribes for the taking of tribal lands; 3) no portion of the Judgment Fund was held in the Treasury to the credit of individual lineal descendants; 4) no individual lineal descendant has been approved to share in the Judgment Fund because the Secretary has not prepared the roll of eligible lineal descendants; 5) plaintiffs cannot identify a specific amount due to themselves; 6) an expectancy of a future property interest is not a present estate protected by the Fifth Amendment; 7) the eligibility letters plaintiffs received from the Secretary in 1979 did not contain any vesting language; and 8) a property right is not effective until all administrative actions required by statute are officially complete. Echoing the United States' argument, the Tribes contend the Judgment Fund was not taken for a "public use" because the United States never acquired an interest in the fund.

In resisting the summary judgment motions and in support of their motion for judgment on the pleadings, plaintiffs contend they possessed a private property interest protected by the Fifth Amendment when the 1998 Act was enacted. Following enactment of the 1972 Act, plaintiffs contend 25.0225% of the Judgment Fund allocated to the lineal descendants was no longer tribal property, subject to Congress' plenary authority over Indian affairs. *See* 25 U.S.C. § 1300d-4(c) (1983) (amended 1998). Plaintiffs claim "payment" of the Judgment Fund occurred when Congress appropriated the money and deposited it into the Treasury, creating a constitutionally protected property interest on behalf of the lineal descendants. Contrary to the United States' and the Tribes' arguments, plaintiffs contend the 1972 Act contains

vesting language as to the lineal descendants' share of the Judgment Fund. At the very least, plaintiffs argue, the lineal descendants obtained a vested right in the Judgment Fund when the Secretary prepared the roll of eligible lineal descendants in 1987. Plaintiffs assert this action is brought on behalf of the class of lineal descendants, rather than solely for their individual benefit. Regarding their breach-of-trust claim, plaintiffs contend Congress gave the lineal descendants a specific property right by creating a trust fund for lineal descendants when it allocated funds to them in 1972. Plaintiffs claim the United States breached its fiduciary obligations by (1) failing to pay plaintiffs the amount of money awarded to them under the 1972 Act within a reasonable time and manner; and (2) enacting the 1998 Act, giving the Tribes approximately 28% of the lineal descendants' share of the Judgment Fund.

II. DECISION

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 256 (1986). In reviewing a motion for summary judgment, this Court views the evidence in a light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970). "Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit or otherwise' designate 'specific facts showing that there is a genuine issue for trial.' " *Commercial Union Ins. Co. v. Schmidt,* 967 F.2d 270, 271 (8th Cir. 1992) (quoting Fed.R.Civ.P. 56(e)).

Plaintiffs move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). "Judgment on the pleadings is appropriate only where the moving party has clearly established that no material issue of fact remains and the moving party is entitled to judgment as a matter of law." *Potthoff v. Morin,* 245 F.3d 710, 715 (8th Cir. 2001). All facts pleaded by the non-moving party are accepted as true and all reasonable inferences from the pleadings are drawn in favor of the non-moving party. *See United States v. Any and All Radio Station Transmission Equip.,* 207 F.3d 458, 462 (8th Cir. 2000), *cert. denied,* 531 U.S. 1071 (2001).

Plaintiffs claim in their briefs on the pending motions that they are seeking to represent a class of lineal descendants rather than solely representing the interests of the named plaintiffs in this action. Plaintiffs, however, have not made a motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure and the Court has not ruled that this action can be maintained as a class action.

A. Fifth Amendment Claim

Plaintiffs contend the 1998 Act violates their rights under the Fifth Amendment. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." The Supreme Court explained that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison,* 529 U.S. 598, 607 (2000). Congressional acts are presumed to be constitutional. *See*

id.; Rostker v. Goldberg, 453 U.S. 57, 64 (1981); *Flemming v. Nestor,* 363 U.S. 603, 617 (1960).

The Eighth Circuit recognized that "vested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens." *Irving v. Clark,* 758 F.2d 1260, 1262 (8th Cir. 1985) (quoting *Choate v. Trapp,* 224 U.S. 665, 677 (1912)). Congress may, however, "alter and condition rights that have not yet vested in individual Indians." *Irving,* 758 F.2d at 1262 (citing *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *United States v. Jim,* 409 U.S. 80 (1972) (per curiam)).

Property interests protected by the Fifth Amendment "are not created by the Constitution, but are instead defined by 'existing rules or understandings that stem from an independent source. . . . '" *Education Assistance Corp. v. Cavazos,* 902 F.2d 617, 627 (8th Cir.), *cert. denied,* 498 U.A. 896 (1990) (quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984)). The independent source may be state law or federal law "which defines a person's relation to a particular thing." *Cavazos,* 902 F.2d at 627 (citing *Flemming,* 363 U.S. at 608-11). In this case, federal law defines plaintiffs' relation to the Judgment Fund:

> **(a) Basis of apportionment**
>
> After deducting the amount authorized in section 1300d of this title, the funds derived from the judgment awarded in Indian Claims Commission docket numbered 142 and the one-half remaining from the amount awarded in docket numbered 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

Tribe or group	Percentage
Devils Lake Sioux of North Dakota	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana	10.3153
All other Sisseton and Wahpeton Sioux	25.0225

(b) Deposit in United States Treasury; per capita shares; advances, deposits, expenditures, investments or reinvestments for approved purposes; programming proposals

The shares of the Devils Lake Sioux Tribe of North Dakota, the Sisseton and Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation, Montana, as apportioned in accordance with subsection (a) of this section, shall be placed on deposit in the United States Treasury to the credit of the respective groups. Seventy per centum of such funds shall be distributed per capita to their tribal members: *Provided,* That none of the funds may be paid per capita to any person whose name does not appear on the rolls prepared pursuant to section 1300d-3(a) of this title. The remainder of such funds may be advanced, deposited, expended, invested, or reinvested for any purpose designated by the respective tribal governing bodies and approved by the Secretary of the Interior. . . .

(c) Per capita distribution to enrollees

The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a) of this section, shall be distributed per capita to the

> persons enrolled on the roll prepared by the Secretary pursuant to section 1300d-3(b) of this title.

25 U.S.C. § 1300d-4 (1983) (amended 1998). Thus, 25.0225% of the Judgment Fund was to be distributed per capita to the lineal descendants.

Congress imposed a one-year statute of limitations for the lineal descendants to file an action challenging the constitutionality or validity of the 1998 Act. *See* 25 U.S.C. § 1300d-27(d) (2001). Plaintiffs argue that this provision shows Congress recognized that the 1998 Act may be unconstitutional. A similar argument was advanced by the plaintiffs in *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 654, n.6 (1976). The Supreme Court rejected the plaintiffs' argument, stating " . . . Congress merely recognized that a plausible argument might be made on behalf of the allottees and desired its merit to be judicially determined." *Id.* The same rationale applies in the present case.

Plaintiffs argue that their share of the Judgment Fund was individual, rather than tribal, property because 25 U.S.C. § 1300d-4(c) (1983) (amended 1998) allocated 25.0225% of the Judgment Fund to them individually rather than to any tribal entity. A similar argument was made by individual Indians in *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 85 (1977) and was rejected by the Supreme Court. The plaintiffs in *Weeks* were individual Indians excluded from a congressional act providing for distribution of funds to certain Indians pursuant to an award by the Indian Claims Commission to redress the United States' breach of an 1854 treaty. *See id.* at 75; Pub. L. No. 92-456, 86 Stat. 762 (codified at 25 U.S.C. §§ 1291-97). The challenged act provided that ten

per cent of the award was to be set aside for two tribal bodies and the remaining 90 per cent was to be distributed per capita to certain individual Indians. *See* 25 U.S.C. § 1294. Despite the appropriation of funds to be distributed to individual Indians, the Supreme Court found that "Public Law 92-456 distributes tribal rather than individually owned property, for the funds were appropriated to pay an award redressing the breach of a treaty with a tribal entity." *Weeks,* 430 U.S. at 85. The Supreme Court recognized that "[a]s tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes, an authority 'drawn both explicitly and implicitly from the Constitution itself.'" *Id.* (quoting *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974)). Moreover, the Supreme Court explained that Congress retains the power to revise its original allocation of judgment funds before distribution of the funds is made. *See Weeks,* 430 U.S. at 90 (citing *United States v. Jim,* 409 U.S. 80, 82-83 (1972)).

Similar to the funds involved in *Weeks,* the Judgment Fund at issue in this action was appropriated to pay an Indian Claims Commission award redressing the United States' breach of treaties with tribal entities. *See Sisseton II,* 895 F.2d at 590; *Sisseton and Wahpeton Bands or Tribes v. United States,* 18 Ind.Cl.Comm. 526-1 (1967). In both *Weeks* and the present case, Congress enacted a distribution plan that included per capita payments to certain individual Indians. *See* 25 U.S.C. § 1294; 25 U.S.C. § 1300d-4 (1983) (amended 1998). Despite the allocation of funds to individual Indians in *Weeks,* the Supreme Court held that the appropriated funds remained "tribal rather than individually owned property." 430 U.S. at 85. One

distinction between the present case and *Weeks,* is that the plaintiffs here are individual Indians who were included in the distribution plan and the plaintiffs in *Weeks* were individual Indians who were excluded from the distribution plan. This distinction does not change the character of the property from tribal to individual property in the present case, but it does require the Court to consider whether plaintiffs have a vested property interest in the Judgment Fund.

The allocation language in the act challenged in *Weeks* differs from the allocation language to the lineal descendants in the 1972 Act. *Compare* 25 U.S.C. § 1294, *with* 25 U.S.C. § 1300d-4(c) (1983) (amended 1998). The funds at issue in *Weeks* were allocated to the tribe and 90 per cent of those funds were directed to be distributed per capita to each person on the Secretary's roll. *See* 25 U.S.C. § 1294. The lineal descendants' share of the Judgment Fund in the present case was not allocated to the Tribes for subsequent per capita distribution to the lineal descendants. *See* 25 U.S.C. § 1300d-4(c) (1983) (amended 1998). Rather, Congress allocated the funds directly to the lineal descendants and provided that those funds were to be distributed per capita to the lineal descendants on the roll prepared by the Secretary. *See id.* Congress directed that the funds at issue in *Weeks* "shall be placed to the credit of the tribe in the United States Treasury." 25 U.S.C. § 1294. Likewise, the Tribes' share of the Judgment Fund was required to be "placed on deposit in the United States Treasury to the credit of the respective groups." 25 U.S.C. § 1300d-4(b) (1983) (amended 1998). Conversely, Congress did not direct that the lineal descendants' share be placed to the credit of the lineal descendants in the United States Treasury. *See* 25 U.S.C. § 1300d-4(c) (1983) (amended

1998). The absence of a credit in the United States Treasury for the lineal descendants appears to provide Congress with more power to alter the allocation plan for the Judgment Fund than it possessed over the funds at issue in *Weeks,* making it less likely that the lineal descendants possessed a vested property interest under the 1972 Act.

The Tribes and the United States cite the Supreme Court's decision in *Hollowbreast,* 425 U.S. at 649 to support their argument that plaintiffs did not have a vested property interest in the Judgment Fund. The issue in *Hollowbreast* was whether individual allottees of surface lands possessed vested rights in mineral deposits underlying those lands. *See id.* at 650. The Supreme Court held that a 1926 congressional act did not grant the allottees vested rights in the mineral deposits. *See id.* Individual tribal members were granted allotments of tracts of land by the 1926 Act, but the rights to the timber, coal or other minerals, including oil, gas, and other natural deposits on those lands were reserved for the benefit of the tribe. *See id.* The 1926 Act further provided that "'at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs.'" *Id.* (quoting Northern Cheyenne Allotment Act of June 3, 1926, 44 Stat. 690, 691). In the 1960's the value of coal reserves under the allotted lands increased considerably. *See id.* at 652. In response to the increase in the value of coal and other considerations, Congress terminated the grant to allottees of the mineral deposits and reserved the mineral rights "'in perpetuity for the benefit of the Tribe.'" *Id.* (quoting Act of July 24, 1968, Pub.L. 90-424, 82 Stat. 424). To avoid liability for damages based upon a potential claim

that the 1968 Act violated the allottees' rights under the Just Compensation Clause of the Fifth Amendment, Congress conditioned the termination of the allottees' interest in the mineral deposits upon a judicial determination that the 1926 Act did not grant allottees vested rights to the mineral deposits. *See id.* at 653.

In *Hollowbreast,* the Supreme Court observed that it "has consistently recognized the wideranging congressional power to alter allotment plans until those plans are executed." *Id.* at 655-56. "The extensiveness of this congressional authority, as well as 'Congress' unique obligation toward the Indians,' underlies the judicially fashioned canon of construction that these [allotment] statutes are to be read to reserve Congress' powers in the absence of a clear expression by Congress to the contrary." *Id.* at 656 (citations omitted). Because the 1926 Act was consistent with both the allottees' interpretation that the 1926 Act granted allottees a vested future interest and with the tribe's interpretation that it granted only an expectancy, the Supreme Court looked to the 1926 Act's legislative history to determine Congress' intent. *See id.* at 654. The legislative history of the 1926 Act demonstrated that the tribe desired to give individual tribal members agricultural and grazing lands, but reserve all mineral rights for the tribe. *See id.* at 657. The provision granting mineral rights to allottees after 50 years was not explained in the legislative history of the 1926 Act. *See id.* After examining the legislative history, the Supreme Court concluded it was not Congress' intent to grant individual allottees vested future interests in the mineral deposits underlying the allotted lands. *See id.* at 658-60. Thus, the individual allottees did not possess a vested property interest in the

mineral deposits and the 1968 Act did not violate the Just Compensation Clause of the Fifth Amendment. *See id.*

Unlike the legislative history of the 1926 Act challenged in *Hollowbreast,* the legislative history of the 1972 Act reveals Congress' intention to include in the distribution the lineal descendants of the aboriginal bands who did not become members of the three successor tribes. *See* S. Rep. No. 92-144, at 2-3; H. Rep. No. 92-1369, at 3-4 (1972). The Senate Committee on Interior and Insular Affairs report on the 1972 Act provides, in relevant part:

> PURPOSE
>
> The purpose of S. 1462, introduced by Senator McGovern, for himself and Senator Burdick, is to authorize the distribution to Sisseton and Wahpeton Tribes of Sioux Indians their portion of a judgment against the United States recovered by the Mississippi Sioux Indians. The money has been appropriated and the net amount available is $6,154,020.79.
>
> NEED
>
> The judgment, although appropriated, may not be used until the purpose has been authorized by Congress.
>
> Successors to the combined Sisseton-Wahpeton (known as the Upper Council Sioux) are:
>
> The Sisseton-Wahpeton Sioux Tribe of South Dakota (Lake Traverse Reservation).
>
> The Devils Lake Sioux Tribe of North Dakota (Devils Lake Reservation).

The Sisseton-Wahpeton element within the Assinaboine and Sioux Tribe of Montana (Fort Peck Reservation).

While it is clear that these successor tribes exist and are representative of the aggrieved aboriginal bands, historical evidence confirms that there are additional descendcnts (sic) who are not enrolled with these successor tribes, but are entitled to share in the proceeds of the award.

The wide dispersion of the dscendants (sic) of the aboriginal Sisseton-Wahpeton Sioux Tribes resulted from their participation in the Mississippi Sioux uprising against white settlers in Minnesota in August 1862, and which was brought under control by the military in 1863. After the uprising, the major portion of the Sisseton-Wahpeton bands of the Mississippi Sioux fled west and north, with some moving into Canada where many continue to reside.

A demonstrated result of the 1862 uprising was the forced and widespread dispersal of the aboriginal bands. Some descendents (sic) are living on the three successor reservations and others, and some descendents (sic) are scattered over a wide area. The bill therefore provides a method for all persons of Sisseton-Wahpeton Sioux blood to share in the award.

The bill provides for a basic apportionment of the judgement funds among the claimant groups on the basis of the 1909 McLaughlin Annuity Roll.

The percentage breakdown, as provided in section 5, is as follows:

Devils Lake Sioux of North Dakota	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana (meaning the Sisseton-Wahpeton element)	10.3153
All other Sisseton and Wahpeton Sioux	25.0225

These percentages derive from the names and addresses found on the 1909 roll; 963 persons residing at Devils Lake, 1,903 at Lake Traverse, 458 at Fort Peck, and 1,111 elsewhere, many on other reservations.

The bill authorizes the successor groups to utilize 70 per cent of their share of the funds for per capita payments to duly enrolled members and 30 per cent for programs to benefit the membership residing on their respective reservations and approved by the Secretary of the Interior. Others shall receive their proportionate share of the funds on proof of lineal descendancy with the aboriginal band. All of the concerned Indian groups endorse this method of apportionment and distribution of the judgment funds.

The Committee concurs with the provision of the bill that non-citizens shall not be enrolled. This is in reference to the Canadian Mississippi Sioux, and the proscription is supported by the successor tribes and the Department of the Interior.

S. Rep. No. 92-144, at 2-3. The House Committee on Interior and Insular Affairs submitted a similar report,

which is set out in the margin.[3] While the 1972 Act's legislative history evidences Congress' intent to include the lineal descendants in the distribution of the Judgment

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[3] The committee report provides in relevant part:

EXPLANATION

The judgments were in favor of aboriginal bands that do not exist today. However, five modern day tribes are partial successors to the aboriginal bands. They are the Santee Sioux Tribe of Nebraska, the Flandreau Santee Sioux Tribe of South Dakota, the Sisseton Wahpeton Tribe of South Dakota, the Devils Lake Tribe of North Dakota, and the Siou[x] Tribe on the Fort Peck Reservation. These tribes should share in the judgments, but inasmuch as numerous descendants of the aboriginal bands are not numbers of these five tribes, the descendants also should share.

H.R. 6070 provides that the five successor tribes will prepare current membership rolls, and that descendancy rolls will be prepared for the others. These rolls will be used as the basis for a per capita distribution of a part of the judgments among the Indians.

Before any per capita distribution can be made, however, the money must be divided among the various tribal entities, and the group represented by the descendancy rolls. In the case of the Lower Sioux (Mdewakanton-Wahpakoota) the division will be on the basis of the relative numbers of Indians enrolled in the two successor tribes and the numbers of Indians enrolled on the descendancy rolls. In the case of the Upper Sioux (Sisseton-Wahpeton) the division will be made on the basis of the relative numbers of Indians residing in 1909 on the three reservations now occupied by the three successor tribes, and the number of descendants not so enrolled.

The five successor tribes will distribute per capita a portion of their share of the judgments. The Lower Sioux will distribute 80% and the Upper Sioux will distribute 70%. The balance will be programed for Reservation purposes. All Indians enrolled on the descendancy rolls will receive a 100% per capita.

H. Rep. No. 92-1369, at 3-4 (1972).

Fund, it does not relinquish Congress' power to alter the allocation of the Judgment Fund.

In support of their argument that plaintiffs do not possess a protected property interest in the Judgment Fund, the Tribes and the United States also cite the Supreme Court's decision in *United States v. Jim,* 409 U.S. 80 (1972). In 1933, Congress added lands to the Navajo Reservation in Utah and provided that 37½ percent of royalties from oil and gas leases were to be paid to the State of Utah to be expended "in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands . . . or for the benefit of the Indians residing [in the Aneth Extension]." *Id.* at 80-81. Administrative problems developed in implementing the 1933 Act. *See id.* at 81-82. In response to these problems, Congress enacted a statute in 1968 that substantially expanded the pool of beneficiaries for whom the State was to expend the royalties. *See id.* The individual Indians who received the benefit of the royalties under the 1933 Act brought a class action alleging the 1968 Act was an unconstitutional taking of property without just compensation. *See id.* The Supreme Court concluded the mineral lease royalties were tribal property. *See id.* at 82. Despite the 1933 Act's establishment of a distribution scheme that benefitted the individual plaintiffs more than other Indians on the Navajo Reservation, the Supreme Court held that "it was well within the power of Congress to alter [the] distributional scheme [in the 1933 Act]." *Id.* at 82. Finding that the 1933 Act did not confer a "property" interest, in the Fifth Amendment sense, upon the residents of the Aneth Extension, the Supreme Court held that the 1968 Act did not violate those residents' rights under the Fifth Amendment. *See id.* at 83. The 1998 Act in

the present case diminishes the plaintiffs' interests in the Judgment Fund in much the same way the 1968 Act diminished the plaintiffs' interests in *Jim*.

In support of its conclusion that Congress had the power to alter the distributional scheme in *Jim*, the Supreme Court cited its decision in *Gritts v. Fisher*, 224 U.S. 640 (1912). *See Jim*, 409 U.S. at 82-83. Congress established an allotment and distributional scheme in 1902 relating to the Cherokee tribe's lands and funds, which precluded any children born after September 1, 1902 from sharing in the allotments and distribution of tribal property. *See Gritts*, 224 U.S. at 641, 643-44. Before the allotments and distributions under the act of 1902 were complete, Congress expanded the pool of Indians who were to benefit from land allotments and distribution of tribal property, to include any children born between September 1, 1902 and March 4, 1906. *See id.* at 646-47. Three tribal members adversely affected by this expansion, on behalf of themselves and others similarly situated, claimed that their due process rights were violated because the act of 1902 vested in them an "absolute right to receive all lands of the tribe not reserved or allotted thereunder, and all funds of the tribe not used in the payment of tribal debts." *Id.* at 646-47. Despite the express intent of Congress in the act of 1902 that the plaintiffs alone should receive allotments and participate in the distribution of excess lands and funds of the tribe, that express intention "did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution." *Id.* at 648. Plaintiffs' argument failed because:

> [I]t treats the act of 1902 as a contract, when it is only an act of Congress, and can have no greater effect. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

Id. (quotation marks and citations omitted). Although *Gritts* involved a due process challenge to a congressional act, its discussion of the vesting of property interests is instructive in the present case. Similar to *Gritts,* the 1972 Act did not create contractual rights and did not expressly preclude Congress from changing the allocation of the Judgment Fund prior to distribution.

In further support of their argument that plaintiffs do not possess a vested interest in the Judgment Fund, the Tribes point out that the plaintiffs will not be able to identify the exact amount they will each receive under the 1972 Act until the Secretary prepares the roll of eligible lineal descendants under 25 U.S.C. § 1300d-3(b) (2001). *See Seldovia Native Ass'n. Inc. v. United States,* 144 F.3d 769 (Fed.Cir. 1998). *Seldovia* involved a takings claim by a native Alaskan village corporation relating to land allocations under the Alaska Native Claims Settlement Act ("ANCSA"), Pub.L. No. 92-203, 85 Stat. 668 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629f). *See Seldovia,* 144 F.3d at 771-72. Each village corporation was allowed to select land they desired to possess based upon the size of its native population, but the ANCSA did not directly convey any specific land to the corporations. *See id.* at 772. The ANCSA did not convey land or money to individual Alaskans. *See id.* After the village corporations made their selections, the Secretary of the Interior and other offices

responsible for issuing the patents needed time to survey the lands, verify that the selections were valid and resolve conflicting claims among the village corporations. *See id.* at 773. The process of allocating the land under the ANCSA created significant problems and the ANCSA had to be amended. *See id.* at 773-74. As a result of the amendments, some of the lands originally selected by the Seldovia village corporation were no longer available. *See id.* at 774. Seldovia then brought an action contending the initial act of selection gave it compensable property rights in the selected lands and that the amendments to the ANCSA constituted a taking of those lands in violation of the Fifth Amendment. *See id.*

The Federal Circuit found that Seldovia's initial land selections under the ANCSA were insufficient to convey compensable property rights to Seldovia "because selections by the village corporations lack fixity, i.e., selection does not sufficiently identify specific parcels in which rights are to be transferred." *Id.* at 781. None of the village corporations were able to identify with certainty any specific parcel of land it stood to receive until the Department of the Interior surveyed the land, confirmed the lack of pre-existing rights to the selected land and resolved competing claims to specific parcels of land. *See id.* Following selection, but before conveyance of the selected land, Seldovia did not possess "the right to lease or convey the land selected, the right to exclude others from entering the land, or the right to control the disposition of any resources on the land." *Id.* at 782. "Thus, Seldovia did not enjoy any of the rights usually associated with a compensable interest in property, such as 'the right to posses, use and dispose of' property, or the rights to alienate or to exclude others." *Id.* (citations omitted). The Federal

Circuit concluded that following the land selections, "Seldovia had an expectation of receiving a certain amount of acreage, but it had no vested right to a specific parcel of land." *Id.* The text of the ANCSA and amendments thereto demonstrated that Congress did not intend to convey vested property rights in specific parcels of land based solely upon village corporations' selections. *See id.* at 7782-83.

Similar to the plaintiffs in *Seldovia,* plaintiffs here do not enjoy any of the rights normally associated with a compensable property interest. Plaintiffs cannot identify the amount of their individual property interests until the Secretary completes the roll required by 25 U.S.C. § 1300d-3(b) (2001). As noted above, this is not a class action where plaintiffs represent the entire class of lineal descendants. Plaintiffs obviously do not have the right to possess, use and dispose of their share of the Judgment Fund.

The above cases demonstrate that the statutory language and the legislative history of the 1972 Act must be evaluated to determine whether Congress intended to grant plaintiffs a vested property interest in the Judgment Fund. It is not clear from the statute itself whether Congress granted plaintiffs a vested interest in their allocated share of the Judgment Fund. *See* 25 U.S.C. § 1300d-4 (1983) (amended 1998). Therefore, pursuant to *Hollowbreast,* the 1972 Act's legislative history must be evaluated to determine whether Congress intended to grant a vested interest to plaintiffs. 425 U.S. at 654. The legislative history of the 1972 Act quoted above shows that Congress intended, in 1972, to include the lineal descendants in the distribution of the Judgment Fund. *See* S. Rep. No. 92-144, at 2-3; H. Rep. No. 92-1369, at 3-4. But the legislative

history does not establish that plaintiffs obtained a *vested* property right under the 1972 Act. Neither the legislative history of the 1972 Act nor the allocation language in the statute demonstrate that Congress intended to relinquish its "traditional broad authority over the management and distribution of lands and property held by recognized tribes." *Weeks,* 430 U.S. at 85; *see* 25 U.S.C. § 1300d-4 (1983) (amended 1998). Despite the legislative history of the 1972 Act showing that Congress intended to include the lineal descendants in the distribution of the Judgment Fund, the lineal descendants did not obtain *vested* property rights in the Judgment Fund because Congress retained the power to alter the allocation plan until the funds were distributed. *See Weeks,* 430 U.S. at 90 (recognizing that Congress retains the power to revise its original allocation of judgment funds before the funds are distributed); *Hollowbreast,* 425 U.S. at 655-56 (recognizing Congress' power to "alter allotment plans until those plans are executed," in the absence of a "clear expression by Congress to the contrary."); *Jim,* 409 U.S. at 82 (upholding Congress' alteration of a distribution scheme involving tribal property); *Gritts,* 224 U.S. at 648 (holding that despite Congress' express intent that plaintiffs alone should receive distributions, that express intention "did not confer upon them any vested right" preventing Congress from altering the plan). The lineal descendants' share was not distributed when Congress enacted the 1998 Act. Therefore, Congress retained the power to alter the allocation plan in the 1972 Act and the enactment of the 1998 Act did not effect a taking of plaintiffs' property.

The Tribes seek to defend against the plaintiffs' claims by challenging the 1972 Act as a taking of their property in violation of the Fifth Amendment. The Tribes' arguments

are barred by the statute of limitations or have otherwise been found to be without merit. *See Sisseton I,* 686 F.Supp. at 837-38 (dismissing Tribes' action challenging the 1972 Act as barred by the six-year statute of limitations applicable to all civil actions against the United States); *Sisseton II,* 895 F.2d at 597 (rejecting the Tribes' constitutional challenges to the 1972 Act with one exception); *Sisseton III,* 90 F.3d at 356 (rejecting the remaining exception remanded in *Sisseton II*).

Plaintiffs contend that the claims raised by the Tribes in their motion for summary judgment regarding the constitutionality of Congress' allocation of funds to the lineal descendants in the 1972 Act are barred by the doctrine of res judicata. The Court agrees that the Tribes' claims are barred by res judicata.

"Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States,* 440 U.S. 147, 153 (1979). Res judicata will bar a claim when: "(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." *Costner v. URS Consultants, Inc.,* 153 F.3d 667, 673 (8th Cir. 1998). "Furthermore, the party against whom res judicata is asserted must have had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect." *In re Anderberg-Lund Printing Co.,* 109 F.3d 1343, 1346 (8th Cir. 1997). It is clear from the above discussion regarding the prior lawsuits pursued by the Tribes that elements one, two and four are satisfied. The remaining element requires that plaintiffs be in privity with a party to the prior lawsuits

because plaintiffs were not parties to the prior actions. "There are three generally recognized categories of nonparties who will be considered in privity with a party to the prior action and who will be bound by a prior adjudication: (1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequatcly represented by a party to the original action." *Tyus v. Schoemehl,* 93 F.3d 449, 454 (8th Cir. 1996), *cert. denied,* 520 U.S. 1166 (1997). The third category applies in this case. In the prior actions, the United States defended the constitutionality of the 1972 Act that allocated a portion of the Judgment Fund to the plaintiffs and other lineal descendants. *See Sisseton I,* 686 F.Supp. at 831; *Sisseton II,* 895 F.2d at 591-92; *Sisseton III,* 90 F.3d at 351. The United States adequately represented the plaintiffs' interests in the prior actions. Thus, plaintiffs were in privity with the United States and are bound by the prior actions.[4] The Tribes are likewise bound by the prior actions under the doctrine of res judicata. *See Costner,* 153 F.3d at 673 (elements of res judicata).

B. Breach-of-Trust Claims

Plaintiffs contend the United States breached its fiduciary obligations by (1) failing to pay plaintiffs the

[4] Plaintiffs are, of course, advocating that they are bound by the prior actions because those actions were resolved in favor of the United States. Asserting res judicata in this context is similar to the offensive use of collateral estoppel allowed by the Supreme Court in *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 329-33 (1979). Trial courts have broad discretion to determine when offensive use of collateral estoppel will be allowed. *See id.* None of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel are present in this case. *See id.*

amount of money allocated to them under the 1972 Act within a reasonable time and manner; and (2) enacting the 1998 Act, giving the Tribes approximately 28 per cent of the lineal descendants' share of the Judgment Fund. The United States contends: (1) any claim for delay in distribution between 1972 and 1987 is barred by the six-year statute of limitations applicable to all civil actions against the United States, *see* 28 U.S.C. § 2401(a) (1994); (2) the delay in distribution between 1987 and the present time was due to persistent litigation involving the 1972 Act; and (3) the Court lacks jurisdiction to consider a breach-of-trust claim based on Congress' enactment of a constitutionally valid statute. Plaintiffs' breach-of-trust claim for enacting the 1998 Act involves issues separate from their breach-of-trust claim for delay and they will be addressed separately below.

1. Enactment of 1998 Act

Citing a Court of Claims's[5] decision, the United States contends that the Court lacks jurisdiction over plaintiffs' breach-of-trust claim for enactment of the 1998 Act. *See Menominee Tribe v. United States,* 221 Ct.Cl. 506, 607 F.2d 1335, 1344 (1979), *cert. denied,* 445 U.S. 950 (1980) (distinguishing between an action for a breach of trust based solely on the enactment of a valid statute and actions for breaches of trust resulting from the actions of government officials in violation of a valid statute). This argument is premised on the ground that the 1998 Act is constitutional, because the Court of Claims carefully distinguished

[5] The Court of Claims is now known as the United States Court of Federal Claims. *See* 28 U.S.C. § 171 (1993); Pub. L. No. 102-572, 106 Stat. 4506.

constitutional challenges to congressional acts from non-constitutional breach-of-trust claims based on enactment of congressional acts. *See Menominee,* 607 F.2d at 1339-40, 1343-44. Given that the 1998 Act is constitutional, as discussed above, plaintiffs' breach-of-trust claim relating to enactment of the 1998 Act is indistinguishable from the characterization of plaintiff tribe's claim in *Menominee.* Although the Court is not bound by the decision in *Menominee,* 607 F.2d at 1343, it is instructive regarding the Court's jurisdiction in the present action.

The issue in *Menominee* was "whether 28 U.S.C. §§ 1491 and 1505 give [the Court of Claims] jurisdiction of a non-constitutional breach-of-trust claim for money – not because some federal official contravened a governing statute or treaty – but because Congress itself, in enacting a statute, violated (without trenching on the Constitution) a general trust obligation owed by the United States as a government to the Indians." 607 F.2d at 1340. The two potential sources of jurisdiction referenced by the court were the Tucker Act, 28 U.S.C. § 1491[6], and the act granting the Court of Claims jurisdiction over certain types

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[6] The Tucker Act provides, in relevant part:

> The United States Court of Federal Claims shall have jurisdiction upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1994).

of Indian claims, 28 U.S.C. § 1505.[7] Plaintiffs assert the jurisdictional basis for the breach-of-trust claims in the present action is the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2)[8] (1993). (*See* Motion to Amend Complaint, Doc. 51.) The "Little" Tucker Act does not expand the types of claims allowed by the Tucker Act. Rather, it grants jurisdiction to federal district courts for the same types of claims allowed by the Tucker Act that do not exceed $10,000. *See United States v. Mitchell*, 463 U.S. 206, 212, n.10 (1983) (recognizing the distinction between the two statutes). The Supreme Court held that "by giving the

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[7] The Court of Claims' (now the United States Court of Federal Claims) jurisdiction over Indian claims is defined by 28 U.S.C. § 1505:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (1994).

[8] The "Little" Tucker Act provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1346(a)(2) (1993).

Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Id.* at 212 (footnote omitted). The Supreme Court further recognized that:

> [T]he Tucker Act does not create any substantive right enforceable against the United States for money damages. A substantive right must be found in some other source of law, such as the Constitution, or any Act of Congress, or any regulation of an executive department. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.

Id. at 216-17 (citations and quotation marks omitted).

In *Menominee,* the Court of Claims held that neither the Tucker Act nor the act granting it jurisdiction over Indian claims authorized it to "entertain the nonconstitutional claim that the enactment of the Termination Act of 1954 was a breach of trust by Congress for which the plaintiffs can obtain monetary relief." 607 F.2d at 1343. The plaintiff tribe in *Menominee* was unable to identify a source of substantive law to sustain its unconstitutional breach-of-trust claim. The only potential source of substantive law asserted by plaintiffs here is the provision in the 1998 Act that grants this Court jurisdiction "over any action brought to contest the constitutionality or validity under law of the distributions authorized under [the 1998] Act." 25 U.S.C. § 1300d-27(b)(1) (2001). Rather than allowing plaintiffs to

obtain monetary relief if the 1998 Act was found to be unconstitutional or otherwise invalid, Congress specified the remedy available to lineal descendants if they prevailed in an action challenging the 1998 Act. *See* 25 U.S.C. § 1300d-27(e)(1) (2001). The remedy authorized by Congress in the event of a successful challenge to the 1998 Act is to void the distribution to the Tribes authorized by the 1998 Act, resulting in the lineal descendants receiving their share of the Judgment Fund, plus interest, as provided in the 1972 Act. *See id.* Clearly, this statute cannot "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell,* 463 U.S. at 216-17.

Plaintiffs have failed to identify a source of substantive law that could be interpreted as mandating compensation by the United States for their claim that enactment of the 1998 Act itself was a breach of trust. Based upon the Court of Claims' rationale in *Menominee,* 607 F.2d at 1338-44, the Court concludes that it lacks jurisdiction, under 28 U.S.C. § 1346(a)(2), to hear plaintiffs' claim that enactment of the 1998 Act itself was a breach of trust.

2. Delay in Distributing Funds

As with the breach-of-trust claim for enactment of the 1998 Act, the asserted jurisdictional basis for plaintiffs' breach-of-trust claims relating to delay is the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2). The decision in *Menominee* does not apply to plaintiffs' breach-of-trust claim for delay, because plaintiffs are claiming that the Secretary contravened a federal statute, rather than solely claiming enactment of the 1998 Act itself constituted a breach of trust. *See Menominee,* 607 F.2d at 1340

(expressly distinguishing between a claim that a federal official contravened a governing statute from a claim that Congress itself breached a trust duty by enacting a constitutional statute). There are two issues relating to plaintiffs' breach-of-trust claim for delay. The first issue is whether this Court has jurisdiction under the "Little" Tucker Act, which includes the issue of whether a trust relationship exists between plaintiffs and the United States pursuant to the 1972 Act. The second issue is, even if a trust relationship exists under the 1972 Act, are plaintiffs' breach-of-trust claims barred by the statute of limitations.

a. Jurisdiction and Existence of a Trust Relationship

As explained above, because the Tucker Act does not create any substantive right for money damages, a substantive source of law, such as an Act of Congress, must be identified to establish jurisdiction. *See Mitchell,* 463 U.S. at 216-17. The Supreme Court explained that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages." *Id.* at 218. The Supreme Court has "consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting for a breach of the trust." *Id.* at 226. Thus, plaintiffs must demonstrate that a trust relationship exists between them and the United States based on the 1972 Act to establish jurisdiction under the "Little" Tucker Act.

The 1972 Act requires the Secretary to prepare a roll of lineal descendants and distribute their share of the Judgment Fund. *See* 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c) (1983) (amended 1998). The Supreme Court recognizes the "existence of a general trust relationship between the United States and the Indian people." *Mitchell,* 463 U.S. at 225. "'[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" *Id.* (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)); *see Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1100 (8th Cir. 1989) (same).

The Eighth Circuit addressed the issue of whether the United States has a trust relationship under the 1972 Act with lineal descendants in *Loudner,* 108 F.3d at 900-01. The plaintiffs in *Loudner* are potential lineal descendants who did not file an application to share in the Judgment Fund prior to the Secretary's original deadline in 1973 because they claim they did not receive notice that the Judgment Fund existed. *See id.* at 901. In discussing the United States' duties under the 1972 Act, the Eighth Circuit held that:

> "[T]here is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust." *Rogers v. United States,* 697 F.2d 886, 890 (9th Cir. 1983); *see also United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d

> 580 (1983). This obligation derives from "a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme] Court" under which the Government "has charged itself with moral obligations of the highest responsibility and trust" in carrying out its treaty obligations with the Indian tribes. *Seminole Nation v. United States,* 316 U.S. 286, 296-97, 62 S.Ct. 1049, 1054-55, 86 L.Ed. 1480 (1942) (footnote omitted). This "trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation." *Little Earth of United Tribes, Inc. v. HUD,* 675 F.Supp. 497, 535 (D. Minn. 1987), *amended,* 691 F.Supp. 1215 (D. Minn. 1988), *aff'd,* 878 F.2d 236 (8th Cir. 1989), *cert. denied,* 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990). In this case, the government points to no statutory language relieving it of these long-established obligations with respect to the lineal descendants of the Sisseton-Wahpeton Sioux. Accordingly, *the government had the obligation to act as a trustee in its management of the judgment fund,* and we must judge its conduct "by the most exacting fiduciary standards." *Seminole Nation,* 316 U.S. at 297, 62 S.Ct. at 1054.

Loudner, 108 F.3d at 900-01 (emphasis added).

The 1972 Act clearly imposes fiduciary obligations on the Secretary because the United States retains control over tribal monies while the Secretary is preparing the roll. *See Mitchell,* 463 U.S. at 225 (holding that the United States has fiduciary obligations when it exercises control over tribal monies or properties); *Loudner,* 108 F.3d at 900-01 (holding that under the 1972 Act the United States owes an obligation to act as trustee in its management of

the Judgment Fund). Because the statute clearly establishes fiduciary obligations of the government in preparing the roll of lineal descendants and distributing the funds, it can "fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Mitchell,* 463 U.S. at 226. Accordingly, the Court has jurisdiction over plaintiffs' breach-of-trust claim for delay pursuant to the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2).

In addition to challenging jurisdiction and asserting the statute of limitations, the United States seeks summary judgment on the merits of plaintiffs' breach-of-trust claim for delay. The record does not contain any evidence addressing the reasons for delay in preparing the roll of lineal descendants between 1972 and 1987. Thus, genuine issues of material fact exist on the issue of whether the United States breached trust duties between 1972 and 1987.

The United States further asserts that it is entitled to summary judgment on plaintiffs' breach-of-trust claim relating to any delay in distribution from 1987 to 1996, because the Secretary was enjoined from distributing the lineal descendants' share of the Judgment Fund in litigation initiated and pursued by the Tribes to void any distribution to the lineal descendants. *See Sisseton I,* 686 F.Supp. at 832; *Sisseton II,* 895 F.2d at 591. The issue of whether the United States is liable for breach of trust during the pendency of the litigation pursued by the Tribes between 1987 and 1996 will be decided at the same time as the other aspects of plaintiffs' breach-of-trust claim.

b. Statute of Limitations

The applicable statute of limitations provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[9] 28 U.S.C. § 2401(a). The complaint in this action was filed on May 27, 1999. Accrual of plaintiffs' claims is the key issue here. *See Loudner,* 108 F.3d at 900. The term "accrual" for purposes of the statute of limitations "occurs when the plaintiffs either knew, or in the exercise of reasonable diligence should have known, that they had a claim." *Id.* Plaintiffs were notified in 1979 that they were eligible lineal descendants. (Doc. 67, Exhibits A and B.) By virtue of filing their applications to share in the Judgment Fund, they knew a portion of the Judgment Fund was allocated to the lineal descendants by the 1972 Act and that the funds had not yet been distributed when they received their notifications in 1979. But the knowledge of their eligibility and the lack of distribution by 1979 does not necessarily establish that they either knew, or in the exercise of reasonable diligence should have known, that the Secretary's failure to prepare the roll and distribute the funds by 1979 constituted a breach of trust.

Plaintiffs' breach-of-trust claim for delay in preparing the roll and distributing the funds must be analyzed as two different breaches for purposes of the statute of limitations. The first breach of trust for delay, if any,

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[9] This statute of limitations barred the Tribes' challenges to the 1972 Act in *Sisseton I,* 686 F.Supp. at 836-37 and *Sisseton II,* 895 F.2d at 590. The Eighth Circuit also applied this statute of limitations in *Loudner,* 108 F.3d at 900, involving potential lineal descendants claiming they did not receive sufficient notice of the Judgment Fund.

began in 1972, when the 1972 Act was enacted. The United States contends that the roll was prepared in 1987 and the Secretary was ready to distribute the funds to 1,969 lineal descendants, thereby fulfilling the Secretary's duty under 25 U.S.C. § 1300d-3(b) (1983) (amended 1998). The record before the Court, however, does not contain evidence to conclusively establish that the Secretary did prepare the roll of lineal descendants in 1987. If the roll was prepared in 1987, then a second question arises as to when the plaintiffs knew or should have known that they had a claim for breach of trust for delay in preparing the roll and distributing the funds from 1972 to 1987. The record at this juncture does not contain any evidence to establish that plaintiffs knew or should have known the Secretary prepared the roll and was prepared to distribute the funds in 1987. If it is later established that the Secretary did prepare the roll in 1987 *and* that plaintiffs knew or should have known that they had a claim for breach of trust at any time before May 1993 (which is six years prior to the filing of this action), then plaintiffs' breach-of-trust claim for any delay prior to 1993 would be barred by the statute of limitations. Thus, two genuine issues of material fact exist regarding plaintiffs' first breach-of-trust claim for delay: (1) whether the Secretary prepared the roll of lineal descendants, as required by 25 U.S.C. § 1300d-3(b) (1983) (amended 1998), and was prepared to distribute the lineal descendants' share of the Judgment Fund in 1987; and (2) whether plaintiffs knew or should have known that they had a claim for breach of trust for delay in preparing the roll and distributing the Judgment Fund at any time prior to May 1993 (six years prior to the filing of the complaint in this action).

The second breach of trust for delay, if any, relates to the Secretary's delay in preparing the roll and distributing the funds as required after the Eighth Circuit issued its opinion in *Loudner,* 108 F.3d at 903-04. The statute of limitations clearly has not expired on this aspect of the breach-of-trust claim, because the complaint herein was filed in 1999, well within the six-year statute of limitations. On the record before the Court, genuine issues of material fact exist on the issue of whether the United States has breached trust duties owed to plaintiffs in the preparation of the roll of lineal descendants following the *Loudner* decision. 108 F.3d at 903-04.

III. CONCLUSION

Plaintiffs' motion to amend the complaint will be granted and their second motion for judgment on the pleadings will be denied. The Tribes' and United States' motions for summary judgment will be: (1) granted on plaintiffs' claim that the 1998 Act violated plaintiffs' Fifth Amendment rights; (2) granted on plaintiffs' claim that enactment of the 1998 Act itself constituted a breach of trust; and (3) denied on plaintiffs' breach-of-trust claim for delay in preparing the roll of lineal descendants and distributing the Judgment Fund as required by 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c) (1983) (amended 1998). Genuine issues of material fact exist on the following issues: (1) whether the Secretary prepared the roll of lineal descendants, as required by 25 U.S.C. § 1300d-3(b) (1983) (amended 1998), and was prepared to distributed the lineal descendants' share of the Judgment Fund in 1987; (2) whether plaintiffs knew or should have known that they had a claim for breach of trust for delay in preparing the roll and distributing the Judgment Fund at

any time prior to May 1993 (six years prior to the filing of the complaint in this action); and (3) if either of plaintiffs' breach-of-trust claims for delay are not barred by the statute of limitations, whether the United States breached trust duties owed to plaintiffs' in the preparation of the roll and distribution of the Judgment Fund required by 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c) (1983) (amended 2001).[10] Although the Tribes moved for summary judgment on the breach-of-trust claims, those claims are not asserted against the Tribes and they do not affect the constitutionality or validity of the 1998 Act. Therefore, the Tribes will be dismissed as parties to this action. Accordingly,

IT IS ORDERED:

1. That the plaintiffs' Motion to Amend the Complaint, Doc. 51, is granted.

2. That plaintiffs' Second Motion for Judgment on the Pleadings, Doc. 60, is denied.

3. That the Sisseton-Wahpeton Sioux Tribe, the Spirit Lake Tribe and the Sisseton-Wahpeton Sioux Council of the Assiniboine and Sioux Tribes' Motion for Summary Judgment, Doc. 62, is: (1) granted on plaintiffs' claim that the 1998 Act violated plaintiffs' Fifth Amendment rights; (2) granted on plaintiffs' claim that enactment of the 1998 Act itself constituted a breach of trust; and (3) denied on plaintiffs' breach-of-trust claim for delay in preparing the roll of lineal descendants and distributing the Judgment

[10] The Court will amend the scheduling order to allow a second motion for summary judgment on the remaining issues if the United States or the plaintiffs so desire. Otherwise, a trial date will be set to resolve these issues.

Fund as required by 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c).

4. That the defendant United States' Motion for Summary Judgment, Doc. 66, is: (1) granted on plaintiffs' claim that the 1998 Act violated plaintiffs' Fifth Amendment rights; (2) granted on plaintiffs' claim that enactment of the 1998 Act itself constituted a breach of trust; and (3) denied on plaintiffs' breach-of-trust claim for delay in preparing the roll of lineal descendants and distributing the Judgment Fund as required by 25 U.S.C. §§ 1300d-3(b) and 1300d-4(c).

5. That the Sisseton-Wahpeton Sioux Tribe, the Spirit Lake Tribe and the Sisseton-Wahpeton Sioux Council of the Assiniboine and Sioux Tribes are dismissed as parties to this action and they shall be deleted from the caption.

6. That the United States and the plaintiffs shall notify the Court, on or before October 10, 2001, whether they desire to address the remaining issues in a second summary judgment motion or a trial.

Dated this 25th day of September, 2001.

BY THE COURT:

/s/ Lawrence Piersol
Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Deb Petersen
DEPUTY

Public Law 90-352, 82 Stat. 239

JOINT RESOLUTION

Making supplemental appropriations for the fiscal year ending June 30, 1968 and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated out of any money in the Treasury not otherwise appropriated, to supply supplemental appropriations for the fiscal year ending June 30, 1968, and for other purposes; namely:

CHAPTER I

DEPARTMENT OF TRANSPORTATION

FEDERAL HIGHWAY ADMINISTRATION

FEDERAL-AID HIGHWAYS (TRUST FUND)

For an additional amount for "Federal-aid highways (trust fund)", to remain available until expended, $400,000,000 or so much thereof as may be available in and derived from the "Highway trust fund", which sum is part of the amount authorized to be appropriated for the fiscal year 1967.

CHAPTER II

CLAIMS AND JUDGMENTS

For payment of claims settled and determined by departments and agencies in accord with law and judgments rendered against the United States by the United States Court of Claims and United States district courts, as set forth in House Document Numbered 254 as amended by House Document Numbered 258, Ninetieth

Congress, $50,980,863, including $174,334 payable from the postal fund, together with such amounts as may be necessary to pay interest (as and when specified in such judgments or provided by law) and such additional sums due to increases in rates of exchange as may be necessary to pay claims in foreign currency: *Provided*, That no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise: *Provided further*, That unless otherwise specifically required by law or by the judgment, payment of interest wherever appropriated for herein shall not continue for more than thirty days after the date of approval of this Act.

Approved June 19, 1968.

Public Law 92-555, 86 Stat. 1168

AN ACT

To provide for the disposition of funds appropriated to pay judgment in favor of the Mississippi Sioux Indians in Indian Claims Commission dockets numbered 142, 359, 360, 361, 362, and 363, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the funds appropriated by the Act of June 19, 1968 (82 Stat. 239), to pay compromise judgments to the Mdewakanton and Wahpakoota Tribe of Sioux Indians, and the Sisseton and Wahpeton Tribes of Sioux Indians, in Indian Claims Commission dockets numbered 142, 359, 360, 361, 362, and 363, together with interest thereon, after payment of attorney fees and litigation expenses and

the costs of carrying out the provisions of this Act, shall be distributed as provided in this Act.

TITLE I

SEC. 101. (a) The Flandreau Santee Sioux Tribe of South Dakota and the Santee Sioux Tribe of Nebraska shall bring current their membership rolls as of the date of this Act. The Lower Sioux Indian Community at Morton, Minnesota, the Prairie Island Indian Community at Welch, Minnesota, and the Shakopee Mdewakanton Sioux Community of Minnesota shall prepare rolls of their members who are lineal descendants of the Mdewakanton and Wahpakoota Tribes, and who were born on or prior to and are living on the date of this Act, using available records and rolls at the local agency and area offices, and any other available records and rolls at the local agency and area offices, and any other available records and rolls. Applications for enrollment must be filed with each group named in this section and such rolls shall be subject to approval of the Secretary of the Interior. The Secretary's determination on all applications shall be final.

(b) The Secretary of the Interior shall prepare a roll of the lineal descendants of the Mdewakanton and Wahpakoota Tribe who were born on or prior to and are living on the date of this Act whose names or the names of a lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a). Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota. The Secretary's determination on all applications for enrollment shall be final.

SEC. 102. After deducting the amounts authorized in section 1 of this Act, the funds derived from the judgment awarded the Indian Claims Commission dockets numbered 360, 361, 362, 363, and one-half of the amount awarded in docket numbered 359, plus accrued interest, shall be apportioned on the basis of the rolls prepared pursuant to section 101 of this Act. An amount equivalent to the proportionate shares of those persons who are members of the Flandreau Santee Sioux Tribe of South Dakota, the Santee Sioux Tribe of Nebraska, the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux Community shall be placed on deposit in the United States Treasury to the credit of the respective groups. Eighty per centum of such funds on deposit to the credit of the Flandreau Santee Sioux Tribe of South Dakota and the Santee Sioux Tribe of Nebraska shall be distributed per capita to such tribal members, and the remainder may be advanced, deposited, expended, invested, or reinvested for any purpose designated by the respective tribal governing bodies and approved by the Secretary of the Interior. One hundred per centum of such funds on deposit to the credit of the Lower Sioux Indian Community, the Prairie Island Indian Community, and the Shakopee Mdewakanton Sioux Community shall be distributed per capita of such tribal members: *Provided*, That none of the funds may be paid per capita to any person whose name does not appear on the rolls prepared pursuant to section 2 of this Act. The shares of enrollees who are not members of such groups shall be paid per capita.

TITLE II

SEC. 201. (a) The Devils Lake Sioux Tribe of North Dakota, and the Sisseton and Wahpeton Sioux Tribe of South Dakota, shall bring current their membership rolls of the date of this Act. The Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, shall prepare rolls of their members who are lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe, who were born on or prior to and are living on the date of this Act, and who are entitled to enrollment on their respective membership rolls in accordance with the applicable rules and regulations of the tribe or group involved, using available records and rolls at the local agency and area offices, and any other available records and rolls. Applications for enrollment must be filed with each group named in this section and such rolls shall be subject to approval of the Secretary of the Interior. The Secretary's determination on all applications for enrollment shall be final.

(b) The Secretary of the Interior shall prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who were born on or prior to and are living on the date of this Act whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a). Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota. The Secretary's determination on all applications for enrollment shall be final.

SEC. 202. (a) After deducting the amount authorized in section 1 of this Act, the funds derived from the judgment awarded in Indian Claims Commission docket

numbered 142 and the one-half remaining from the amount awarded in docket numbered 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

Tribe or Group	Percentage
Devils Lake Sioux of North Dakota	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana	10.3153
All other Sisseton and Wahpeton Sioux	25.0225

(b) The shares of the Devils Lake Sioux Tribe of North Dakota, the Sisseton and Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation, Montana, as apportioned in accordance with subsection (a), shall be placed on deposit in the United States Treasury to the credit of the respective groups. Seventy per centum of such funds shall be distributed per capita to their tribal members: *Provided*, That none of the funds may be paid per capita to any person whose name does not appear on the rolls prepared pursuant to section 201(a) of this Act. The remainder of such funds may be advanced, deposited, expended, invested, or reinvested for any purpose designated by the respective tribal governing bodies and approved by the Secretary of the Interior: *Provided*, That, in the case of the Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana, the Fort Peck Sisseton-Wahpeton Sioux Council shall act as the governing body in determining the distribution of funds allotted for programing purposes: *Provided further*, That the Sisseton-Wahpeton Sioux Tribe of South Dakota shall act in concert with its membership residing in the Upper Sioux Community in

Minnesota and its membership affiliated with the Urban Sisseton-Wahpeton Council of the Minneapolis-Saint Paul area in jointly submitting programing proposals to the Secretary.

(c) The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a), shall be distributed per capita to the persons enrolled on the roll prepared by the Secretary pursuant to section 201(b) of this Act.

TITLE III

SEC. 301. No person shall be eligible to be enrolled under this Act who is not a citizen of the United States.

SEC. 302. Any person qualifying for enrollment with more than one group shall elect the group with which he shall be enrolled for the purpose of this Act.

SEC. 303. The sums payable to enrollees or their heirs or legatees who are minors or who are under a legal disability shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interest of such persons after considering the recommendations of the governing bodies of the groups involved.

SEC. 304. None of the funds distributed per capita under the provisions of this Act shall be subject to Federal or State income taxes.

SEC. 305. The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of this Act, including the establishment of deadlines.

Approved October 25, 1972.

Public Law 105-387, 112 Stat. 3471
105th Congress

An Act

To provide for the disposition of certain funds appropriated to pay judgment in favor of the Mississippi Sioux Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998".

SEC. 2 DEFINITIONS.

In this Act:

(1) COVERED INDIAN TRIBE. – The term "covered Indian tribe" means an Indian tribe listed in section 4(a).

(2) FUND ACCOUNT. – The term "Fund Account" means the consolidated account for tribal trust funds in the Treasury of the United States that is managed by the Secretary –

(A) through the Office of Trust Fund Management of the Department of the Interior; and

(B) in accordance with the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.).

(3) SECRETARY. – The term "Secretary" means the Secretary of the Interior.

(4) TRIBAL GOVERNING BODY. – The term "tribal governing body" means the duly elected governing body of a covered Indian tribe.

SEC. 3. DISTRIBUTION TO, AND USE OF CERTAIN FUNDS BY, THE SISSETON AND WAHPETON TRIBES OF SIOUX INDIANS.

Notwithstanding any other provision of law, including Public Law 92-555 (25 U.S.C. 1300d et seq.), any funds made available by appropriations under chapter II of the Public Law 90-352 (82 Stat. 239) to the Sisseton and Wahpeton Tribes of Sioux Indians to pay a judgment in favor of those Indian tribes in Indian Claims Commission dockets numbered 142 and 359, including interest, that, as of the date of enactment of this Act, have not been distributed, shall be distributed and used in accordance with this Act.

* * *

SEC. 7. DISTRIBUTION OF FUNDS TO LINEAL DESCENDANTS.

(a) IN GENERAL. – Subject to section 8(e), the Secretary shall, in the manner prescribed in section 202(c) of Public Law 92-555 (25 U.S.C. 1300d-4(c)), distribute to the lineal descendants of the Sisseton and Wahpeton Tribes of Sioux Indians an amount equal to 71.6005 percent of the funds described in section 3, subject to any reduction determined under subsection (b).

(b) ADJUSTMENTS. –

(1) IN GENERAL. – Subject to section 8(e), if the number of individuals on the final roll of lineal descendants certified by the Secretary under section 201(b) of Public Law 92-555 (25 U.S.C. 1300d-3(b)) is

less than 2,588, the Secretary shall distribute a reduced aggregate amount to the lineal descendants referred to in subsection (a), determined by decreasing –

(A) the percentage specified in section 4(a)(B)(ii) by a percentage amount equal to –

(i) .0277; multiplied by

(ii) the difference between 2,588 and the number of lineal descendants on the final roll of lineal descendants, but not to exceed 600; and

(B) the percentage specified in subsection (a) by the percentage amount determined under subparagraph (A).

(2) DISTRIBUTION. – If a reduction in the amount that otherwise would be distributed under subsection (a) is made under paragraph (1), an amount equal to that reduction shall be added to the amount available for distribution under section 4(a)(1), for distribution in accordance with section 4(a)(2).

(c) VERIFICATION OF ANCESTRY. – In seeking to verify the Sisseton and Wahpeton Mississippi Sioux Tribe ancestry of any person applying for enrollment on the roll of lineal descendants after January 1, 1998, the Secretary shall certify that each individual enrolled as a lineal descendant can trace ancestry to a specific Sisseton or Wahpeton Mississippi Sioux Tribe lineal ancestor who was listed on –

(1) the 1909 Sisseton and Wahpeton annuity roll;

(2) the list of Sisseton and Wahpeton Sioux prisoners convicted for participating in the outbreak referred to as the "1862 Minnesota Outbreak";

(3) the list of Sioux scouts, soldiers, and heirs identified as Sisseton and Wahpeton Sioux on the roll prepared pursuant to the Act of March 3, 1891 (26 Stat. 989 et seq., chapter 543); or

(4) any other Sisseton or Wahpeton payment or census roll that precluded a roll referred to in paragraph (1), (2), or (3).

(d) CONFORMING AMENDMENTS. –

(1) IN GENERAL. – Section 202(a) of Public Law 92-555 (25 U.S.C. 1300d-4(a)) is amended –

(A) in the matter preceding the table –

(i) by striking ", plus accrued interest,"; and

(ii) by inserting "plus interest received (other than funds otherwise distributed to the Sisseton and Wahpeton Tribes of Sioux Indians in accordance with the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998)," after "docket numbered 359,"; and

(B) in the table contained in that subsection, by striking the item relating to "All other Sisseton and Wahpeton Sioux".

(2) ROLL. – Section 201(b) of Public Law 92-555 (25 U.S.C. 1300d-3(b)) is amended by striking "The Secretary" and inserting "Subject to the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998, the Secretary".

* * *

Approved November 13, 1998.

1 U.S.C.A. § 109

Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.